244 N.C. App.—No. 3 Pages 346-545

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 27, 2018

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COURT OF APPEALS

CASES REPORTED

FILED 15 DECEMBER 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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during the appeal period and not through a collateral attack after the appeal period has expired. **State v. McGee, 528.**

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Arbitration and Mediation—arbitrability—decision by court or arbitrator—The trial court erred by concluding that a court would decide the arbitrability of plaintiff's claims instead of an arbitrator. If a party's claim of arbitrability is "wholly groundless," the trial court must deny the party's motion to compel arbitration even if the parties have agreed that an arbitrator should decide questions of substantive arbitrability. Here, given the broad scope of the parties' arbitration clause and the fact that a buyout offer directly related to the agreement, it was plausible that plaintiff's claims were arbitrable and that defendant's motion to compel arbitration was not wholly groundless. **Bailey v. Ford Motor Co., 346.**

Arbitration and Mediation—Federal Arbitration Act—applicable—The Federal Arbitration Act (FAA) applied to any dispute arising from the agreement in this case where the parties affirmatively chose the FAA to govern an agreement to arbitrate. **Bailey v. Ford Motor Co., 346.**

smaller and younger wrestlers for particularly harsh treatment, and subjected them to degrading and often quasi-sexual situations. It was introduced to show a specific intent, plan, or scheme by defendant to create an environment within the wrestling program that allowed defendant to target particular students, groom them for sexual contact, and secure their silence. **State v. Goins, 499.**

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and defendant told the officer on two separate occasions that he had had "quite a bit to drink." **Burris v. Thomas, 391.**

Motor Vehicles—impaired driving—notice of implied consent rights—DMV did not err by concluding that an impaired driving defendant was given notice of his implied-consent rights where an officer read defendant the form while he was in the hospital and then held it up for defendant to read. Although defendant contended that one minute is not enough time to read the form, it consisted of only seven sentences. **Burris v. Thomas, 391.**

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SEXUAL OFFENSES

Sexual Offenses—sufficiency of evidence—location of crime—In a prosecution for sexual offenses against his students by a high school wrestling coach, there was sufficient evidence to deny defendant's motion to dismiss one of the charges for crime against nature where defendant claimed there was insufficient evidence that the crime had occurred in North Carolina. While there was some testimony that the incident may have occurred at a tournament in North Dakota, there was also a video in which the victim described the incident occurring in his bedroom in North Carolina in great detail. **State v. Goins, 499.**

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SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

RICARDO L. BAILEY, PLAINTIFF
v.
FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, LLC, AND KATHLEEN BURNS, INDIVIDUALLY, DEFENDANTS

No. COA15-9

Filed 15 December 2015

1. Appeal and Error—denial of motion to compel arbitration—interlocutory—immediately appealable

An appeal from the denial of a motion to compel arbitration was immediately appealable because it affected a substantial right.

2. Arbitration and Mediation—Federal Arbitration Act—applicable

The Federal Arbitration Act (FAA) applied to any dispute arising from the agreement in this case where the parties affirmatively chose the FAA to govern an agreement to arbitrate.

3. Arbitration and Mediation—scope of arbitration clause—substantive arbitrability

The question of whether the parties' dispute was within the scope of the arbitration clause was an issue of substantive arbitrability and the parties clearly and unmistakably intended that an arbitrator would decide questions of substantive arbitrability.

4. Arbitration and Mediation—arbitrability—decision by court or arbitrator

The trial court erred by concluding that a court would decide the arbitrability of plaintiff's claims instead of an arbitrator. If a party's claim of arbitrability is "wholly groundless," the trial court must deny the party's motion to compel arbitration even if the parties have agreed that an arbitrator should decide questions of substantive arbitrability. Here, given the broad scope of the parties' arbitration clause and the fact that a buyout offer directly related to the agreement, it was plausible that plaintiff's claims were arbitrable and that defendant's motion to compel arbitration was not wholly groundless.

Appeal by defendant from order entered on 20 August 2014 by Judge Elaine M. Bushfan in Superior Court, Wake County. Heard in the Court of Appeals on 4 June 2015.

Sharpless & Stavola, P.A., by Pamela S. Duffy, for plaintiff-appellee.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and Chris W. Haaf, and Williams Mullen, by M. Keith Kapp, for defendant-appellant.

STROUD, Judge.

Ford Motor Company ("defendant") appeals from an order denying its motion to compel arbitration and dismiss. Defendant specifically argues that the trial court erred in concluding that (1) the Federal Arbitration Act ("FAA") did not apply to this dispute; (2) the parties had agreed that a court, instead of an arbitrator, would decide the arbitrability of plaintiff's claims; and (3) that plaintiff's claims were not arbitrable. We reverse.

I. Background

In February 2003, Ricardo L. Bailey ("plaintiff"), an employee of defendant, moved to Sanford to operate and invest in a car dealership. Plaintiff and defendant executed a Stock Redemption Plan Dealer Development Agreement ("the Dealer Development Agreement") in which plaintiff invested $180,000 in exchange for 1,800 shares of common stock in the dealership and defendant invested $1,080,000 in exchange for 10,800 shares of preferred stock in the dealership. Under the agreement, defendant also loaned $540,000 to the dealership.

Under article 10 of the Dealer Development Agreement, plaintiff and defendant agreed to arbitrate any dispute "arising out of or relating to" the agreement:

> 10.01. Resolution of Disputes. If a dispute arises between [plaintiff] and [defendant] arising out of or relating to this Agreement, the following procedures shall be implemented in lieu of any judicial or administrative process:
>
> (a) Any protest, controversy, or claim by [plaintiff] (whether for damages, stay of action or otherwise) with respect to any termination of this Agreement, or with respect to any other dispute between [plaintiff] and [defendant] arising out of or relating to this Agreement shall be appealed by [plaintiff] to the Ford Motor Company Dealer Policy Board (the "Policy

Board") within fifteen (15) days after [plaintiff's] receipt of notice of termination, or within 60 days after the occurrence of any event giving rise to any other claim by [plaintiff] arising out of or relating to this Agreement. Appeal to the Policy Board within the foregoing time periods shall be a condition precedent to the right of [plaintiff] to pursue any other remedy available under this Agreement or otherwise available under law. [Defendant], but not [plaintiff], shall be bound by the decision of the Policy Board.

(b) If appeal to the Policy Board fails to resolve any dispute covered by this Article 10 within 180 days after it was submitted to the Policy Board, or if [plaintiff] shall be dissatisfied with the decision of the Policy Board, the dispute shall be finally settled by arbitration in accordance with the rules of the CPR Institute for Dispute Resolution (the "CPR") for Non-Administered Arbitration for Business Disputes, by a sole arbitrator, but no arbitration proceeding may consider a matter designated by this Agreement to be within the sole discretion of one party (including without limitation, a decision by such party to make an additional investment in or loan or contribution to [the dealership]), and the arbitration proceeding may not revoke or revise any provisions of this Agreement. Arbitration shall be the sole and exclusive remedy between the parties with respect to any dispute, protest, controversy or claim arising out of or relating to this Agreement.

(c) Arbitration shall take place in the City of Dearborn, Michigan unless otherwise agreed by the parties. The substantive and procedural law of the State of Michigan shall apply to the proceedings. Equitable remedies shall be available in any arbitration. Punitive damages shall not be awarded. This Section 10.01(c) is subject to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*, and any judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof.

(d) Any arbitration decision or award shall be final and binding on all parties and shall deal with the

> question of costs of arbitration, including without limitation, legal fees, which shall be borne by the losing party to the arbitration proceeding, and all matters related thereto.

(Portion of original in bold.)

On 17 April 2009, defendant sent a letter ("Dollar Buyout Offer") to plaintiff in which it offered to "waive the repayment of the outstanding balance of preferred stock and note associated with" the Dealer Development Agreement in exchange for one dollar, provided plaintiff satisfied all of the offer's conditions by 30 September 2009. Plaintiff attempted to satisfy all of the conditions necessary to effectuate his acceptance, but the parties dispute whether plaintiff was successful.

On 10 April 2014, plaintiff sued defendant for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment, as well as Ford Motor Credit Company, LLC ("FMCC") and Kathleen Burns, an employee of FMCC, for related claims. Plaintiff alleged that one of the conditions of the Dollar Buyout Offer was that he obtain a standby letter of credit for $300,000 and that he successfully obtained such a letter from Branch Banking & Trust Company ("BB&T"). Plaintiff also alleged that he satisfied all of the offer's conditions but that defendant later changed the offer's conditions to require that his standby letter of credit "be converted to cash[.]" Plaintiff further alleged that he spoke with Burns about this new condition, that she agreed to contact BB&T, but that she never in fact contacted BB&T, which prevented plaintiff from satisfying the new condition by the offer's deadline. Plaintiff alleged that as a result, he was "immediately terminated" and "lost his home to foreclosure."

On 19 May 2014, defendant answered and moved to compel arbitration and dismiss plaintiff's claims against it. After holding a hearing on 22 July 2014, the trial court denied the motion on 20 August 2014. On 4 September 2014, defendant gave timely notice of appeal.

II. Appellate Jurisdiction

Although the trial court's order is interlocutory, defendant contends that the order is immediately appealable because it affects a substantial right. "[T]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 225, 606 S.E.2d 708, 710 (2005) (brackets omitted). Accordingly, we hold that this appeal is properly before us.

III. Motion to Compel Arbitration and Dismiss

[1] Defendant contends that the trial court erred when it denied its motion to compel arbitration and dismiss. Defendant specifically argues that the trial court erred in concluding that (1) the FAA did not apply to this dispute; (2) the parties had agreed that a court, instead of an arbitrator, would decide the arbitrability of plaintiff's claims; and (3) plaintiff's claims were not arbitrable. Because we agree with defendant on issue (2), we do not reach issue (3).

A. Standard of Review

"The trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court." *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003), *aff'd per curiam*, 358 N.C. 146, 593 S.E.2d 583 (2004). "[Q]uestions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*." *Price & Price Mech. of N.C., Inc. v. Miken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008).

B. Choice of Law

[2] We preliminarily note that the trial court's order suggests that it based its conclusion that the FAA did not apply to this dispute on its previous conclusion that the parties had not agreed to arbitrate disputes arising from the Dollar Buyout Offer. But the trial court should have addressed the issue of choice of law before addressing any other legal issue. *See King v. Bryant*, 225 N.C. App. 340, 344, 737 S.E.2d 802, 806 (2013) ("[I]t is incumbent upon a trial court when considering a motion to compel arbitration to address whether the Federal Arbitration Act ('FAA') or the North Carolina Revised Uniform Arbitration Act ('NCRUAA') applies to *any* agreement to arbitrate." (emphasis added and quotation marks and brackets omitted)). It is undisputed that the parties agreed to arbitrate disputes "arising out of or relating to" the Dealer Development Agreement. Accordingly, we must first address whether the FAA applies to the Dealer Development Agreement. *See id.* at 344, 737 S.E.2d at 806.

If the parties affirmatively chose the FAA to govern an agreement to arbitrate, then the FAA will apply to that agreement. *Id.* at 345, 737 S.E.2d at 806-07; *see also* 9 U.S.C.A. ch. 1 (2009). Here, the parties affirmatively chose the FAA to govern the Dealer Development Agreement: "This Section 10.01(c) is subject to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*, and any judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof." Accordingly,

we hold that the FAA applies to any dispute arising from the Dealer Development Agreement. *See King*, 225 N.C. App. at 345, 737 S.E.2d at 806-07.

C. Arbitrability

[3] Defendant next argues that the trial court erred in concluding that the parties had agreed that a court, instead of an arbitrator, would decide the arbitrability of plaintiff's claims.

i. Substantive Arbitrability vs. Procedural Arbitrability

"The twin pillars of consent and intent are the touchstones of arbitrability analysis. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Peabody Holding v. United Mine Workers of America*, 665 F.3d 96, 103 (4th Cir. 2012) (quotation marks omitted).

> Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. If the contract is silent on the matter of who primarily is to decide "threshold" questions about arbitration, courts determine the parties' intent with the help of presumptions.
>
> On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about "arbitrability." These include questions such as "whether the parties are bound by a given arbitration clause," or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."
>
> On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. These procedural matters include claims of waiver, delay, or a like defense to arbitrability. And they include the satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.

BG Group plc v. Republic of Arg., ___ U.S. ___, ___, 188 L. Ed. 2d 220, 228-29 (2014) (citations and quotation marks omitted).

> Both sections 3 and 4 [of the FAA] call for an expeditious and summary hearing, with only restricted inquiry

> into factual issues. Hence, whether granting an order to arbitrate under section 3 or section 4, the district court must first determine if the issues in dispute meet the standards of either "substantive arbitrability" or "procedural arbitrability." A substantive arbitrability inquiry confines the district court to considering only those issues relating to the arbitrability of the issue in dispute and the making and performance of the arbitration agreement. . . . [T]he first duty of the district court when reviewing an arbitration proceeding under section 4 of the Act is to conduct a substantive arbitrability inquiry—meaning the court engages in a limited review to ensure that the dispute is arbitrable—i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement. If the court determines that an agreement exists and that the dispute falls within the scope of the agreement, it then must refer the matter to arbitration without considering the merits of the dispute. All other issues raised before the court not relating to these two determinations fall within the ambit of "procedural arbitrability."
>
> . . . .
>
> It is clear from these decisions, which represent over thirty years of Supreme Court and federal circuit court precedent that issues of "substantive arbitrability" are for the court to decide, and questions of "procedural arbitrability[]" . . . are for the arbitrator to decide.

Glass v. Kidder Peabody & Co., Inc., 114 F.3d 446, 453-54 (4th Cir. 1997) (citations, quotation marks, brackets, and footnotes omitted); *see also* 9 U.S.C.A. §§ 3, 4.

Here, defendant argues that the trial court erred in concluding that plaintiff's claims did not fall within the scope of the arbitration clause of the Dealer Development Agreement. This issue is a question of substantive arbitrability. *Glass*, 114 F.3d at 453; *BG Group*, ___ U.S. at ___, 188 L. Ed. 2d at 228. Therefore, as an initial matter, we presume that the parties intended that the trial court decide this issue of substantive arbitrability. *Glass*, 114 F.3d at 454; *BG Group*, ___ U.S. at ___, 188 L. Ed. 2d at 228.

ii. Clear and Unmistakable Intent

A party can overcome this presumption if it shows that the parties "clearly and unmistakably" intended for an arbitrator, instead of a court,

to decide issues of substantive arbitrability. *See AT&T Technologies v. Communications Workers*, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 656 (1986); *Peabody Holding*, 665 F.3d at 102.

> Those who wish to let an arbitrator decide which issues are arbitrable need only state that "all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration," or words to that clear effect. Absent such clarity, we are compelled to find that disputes over the arbitrability of claims are for judicial resolution.

Carson v. Giant Food, Inc., 175 F.3d 325, 330-31 (4th Cir. 1999).

At least eight federal appellate courts have held that the parties' express adoption of an arbitral body's rules in their agreement, which delegate questions of substantive arbitrability to the arbitrator, presents clear and unmistakable evidence that the parties intended to arbitrate questions of substantive arbitrability. *See Petrofac, Inc. v. DynMcDermott Petroleum*, 687 F.3d 671, 675 (5th Cir. 2012) (holding that the parties' express adoption of the American Arbitration Association rules in their agreement constituted clear and unmistakable evidence); *Fallo v. High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009) (same); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (same); *Terminix Intern. v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (same); *Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005) (same); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015) (same result under the United Nations Commission on International Trade Law rules); *Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074-75 (9th Cir. 2013) (same); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473-74 (1st Cir. 1989) (same result under International Chamber of Commerce rules).

We note that three federal appellate courts have held that the parties had not delegated issues of substantive arbitrability to the arbitrator despite their express adoption of an arbitral body's rules in their agreement. *See Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 225-26, 229-30 (3rd Cir. 2012); *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 490 (7th Cir. 2004); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 777 n.1, 780-81 (10th Cir. 1998). But in each of these cases, the court did not specifically address whether the parties' express adoption of these rules constituted clear and unmistakable evidence that they intended to arbitrate questions of substantive arbitrability, nor did the court examine the rules to determine if they delegated questions of

substantive arbitrability to the arbitrator. *Quilloin*, 673 F.3d at 229-30; *Oblix*, 374 F.3d at 490; *Riley*, 157 F.3d at 780-81. Accordingly, we hold that *Quilloin*, *Oblix*, and *Riley* are inapposite.

Plaintiff argues that while the Fourth Circuit Court of Appeals "has not ruled explicitly" on this issue, two cases from that Court suggest that parties' express adoption of an arbitral body's rules does not constitute "clear and unmistakable" evidence that the parties intended to arbitrate questions of substantive arbitrability. *See Cathcart Properties, Inc. v. Terradon Corp.*, 364 F. App'x 17, 18 (4th Cir. Feb. 4, 2010) (*per curiam*) (unpublished); *Central West Virginia Energy v. Bayer Cropscience*, 645 F.3d 267, 273-74 (4th Cir. 2011). But neither case stands for this proposition or even addresses this issue.

In *Cathcart Properties*, the Fourth Circuit held that the parties did not "clearly and unmistakably" agree to arbitrate questions of substantive arbitrability, "[b]ecause there was no contract provision that expressly stated that the parties agreed to arbitrate the arbitrability of a claim[.]" *Cathcart Properties*, 364 F. App'x at 18. The Court did not address or even mention the issue of whether parties can delegate questions of substantive arbitrability to the arbitrator by expressly adopting an arbitral body's rules. Plaintiff points out that in the relevant arbitration provision, the parties identified the arbitral body that would decide any arbitration claims: "[T]he parties agree that any dispute or controversy arising from this Contract which would otherwise require or allow resort to any court or other governmental dispute resolution forum, shall be submitted for determination by binding arbitration under the Construction Industry Dispute Resolution of the America[n] Arbitration Association." *Cathcart Properties, Inc. v. Terradon Corp.*, Civil Action No. 3:08-0298, slip op. at 2 (S.D. W. Va. Feb. 6, 2009) (unpublished), *aff'd per curiam*, 364 F. App'x 17 (4th Cir. Feb. 4, 2010) (unpublished). But the parties did not expressly adopt the *rules* of an arbitral body; rather, they merely identified the arbitral body. Accordingly, we distinguish *Cathcart Properties*. We also note that as an unpublished opinion, *Cathcart Properties* is not binding precedent in the Fourth Circuit. *Cathcart Properties*, 364 F. App'x at 18.

Plaintiff next points out that in *Central West Virginia Energy*, the Fourth Circuit held that the parties' dispute was "not a matter of arbitrability that necessitates resolution by a court" and that "delineating an issue as either one of arbitrability or one of procedure serves the goal of preserving the former for judicial resolution." *Central West Virginia Energy*, 645 F.3d at 273-74. But the Court also qualified this distinction in accordance with U.S. Supreme Court precedent and quoted *Howsam*

v. Dean Witter Reynolds, Inc.: "[T]he question whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination *unless* the parties clearly and unmistakably provide otherwise." *Id.* at 273 (emphasis added and brackets omitted) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 154 L. Ed. 2d 491, 497 (2002)).

As the Fourth Circuit has not yet addressed the issue of whether parties' express adoption of an arbitral body's rules, which delegate questions of substantive arbitrability to the arbitrator, constitutes "clear and unmistakable" evidence that the parties intended to arbitrate questions of substantive arbitrability, we will follow the majority rule.

We recognize that this Court has held that the parties' adoption of an arbitral body's rules was clear and unmistakable evidence that the parties intended for an arbitrator to decide a question of *procedural* arbitrability. *See Smith Barney, Inc. v. Bardolph*, 131 N.C. App. 810, 817, 509 S.E.2d 255, 259-60 (1998). There, the defendant argued that an arbitrator should decide the question of whether his claims were barred as untimely under the National Association of Securities Dealers ("NASD") arbitration rules. *Id.* at 813, 509 S.E.2d at 257. This Court held: "The parties' adoption of [the NASD rules] is a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators. In no uncertain terms, Section 10324 [of the NASD rules] commits interpretation of all provisions of the NASD Code to the arbitrators." *Id.* at 817, 509 S.E.2d at 259 (brackets omitted). Following the majority rule among the federal appellate courts, we extend this holding to the context of substantive arbitrability.

In article 10.01(b) of the Dealer Development Agreement, the parties expressly adopted the CPR Institute for Dispute Resolution ("CPR") rules:

> If appeal to the Policy Board fails to resolve any dispute covered by this Article 10 within 180 days after it was submitted to the Policy Board, or if [plaintiff] shall be dissatisfied with the decision of the Policy Board, the dispute shall be finally settled by arbitration *in accordance with the rules of the CPR Institute for Dispute Resolution (the "CPR") for Non-Administered Arbitration for Business Disputes*, by a sole arbitrator, but no arbitration proceeding may consider a matter designated by this Agreement to be within the sole discretion of one party (including without limitation, a decision by such party to make an additional

> investment in or loan or contribution to [the dealership]), and the arbitration proceeding may not revoke or revise any provisions of this Agreement. Arbitration shall be the sole and exclusive remedy between the parties with respect to any dispute, protest, controversy or claim arising out of or relating to this Agreement.

(Emphasis added.) Rule 8.1 of the CPR rules provides: "The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, *scope* or validity of the arbitration agreement." (Emphasis added.) Given the parties' adoption of the CPR rules, which includes CPR Rule 8.1., we hold that the parties clearly and unmistakably intended that an arbitrator would decide questions of substantive arbitrability, like the one at issue here. *See Petrofac*, 687 F.3d at 675; *Fallo*, 559 F.3d at 878; *Qualcomm*, 466 F.3d at 1373.

iii. "Wholly Groundless" Exception

[4] Plaintiff responds that even if the parties intended to arbitrate issues of substantive arbitrability, the trial court did not err in denying defendant's motion to compel arbitration because defendant's motion was "wholly groundless." If a party's claim of arbitrability is "wholly groundless," the trial court must deny the party's motion to compel arbitration even if the parties have agreed that an arbitrator should decide questions of substantive arbitrability. *See Local No. 358, Bakery & Confec., etc. v. Nolde Bros.*, 530 F.2d 548, 553 (4th Cir. 1975) ("[T]he arbitrability of a dispute may itself be subject to arbitration if the parties have clearly so provided in the agreement. Of course, the court must decide the threshold question whether the parties have in fact conferred this power on the arbitrator. If they have, the court should stay proceedings pending the arbitrator's determination of his own jurisdiction, *unless it is clear that the claim of arbitrability is wholly groundless.*") (emphasis added), *aff'd*, 430 U.S. 243, 51 L. Ed. 2d 300 (1977). The purpose of this inquiry is to "prevent[] a party from asserting any claim at all, no matter how divorced from the parties' agreement, to force an arbitration." *Qualcomm*, 466 F.3d at 1373 n.5.

> Because the wholly groundless inquiry is supposed to be limited, a court performing the inquiry may simply conclude that there is a legitimate argument that the arbitration clause covers the present dispute, and, on the other hand, that it does not[,] and, on that basis, leave the resolution of those plausible arguments for the arbitrator.

> Nevertheless, the wholly groundless inquiry necessarily requires the courts to examine and, to a limited extent, construe the underlying agreement.

Douglas v. Regions Bank, 757 F.3d 460, 463 (5th Cir. 2014) (quotation marks, brackets, and ellipsis omitted).

Here, the scope of the parties' arbitration agreement is broad and covers "any dispute, protest, controversy or claim arising out of or relating to" the Dealer Development Agreement. *See American Recovery v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996) (holding that substantively identical language in an arbitration provision was "capable of an expansive reach" and "embraced every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute" (brackets omitted)). All of plaintiff's claims against defendant arise from his allegation that after he satisfied all of the conditions necessary to effectuate his acceptance of the Dollar Buyout Offer, defendant unilaterally changed one of the offer's conditions, which plaintiff then was unable to satisfy. Under the Dollar Buyout Offer, defendant offered to "waive the repayment of the outstanding balance of preferred stock and note associated with" the Dealer Development Agreement in exchange for one dollar, provided plaintiff satisfied all of the offer's conditions. Given the broad scope of the parties' arbitration clause in the Dealer Development Agreement and the fact that the Dollar Buyout Offer directly relates to the Dealer Development Agreement, we hold that it is plausible that plaintiff's claims are arbitrable and thus defendant's motion to compel arbitration is not "wholly groundless." *See Douglas*, 757 F.3d at 463. Accordingly, we hold that the trial court erred in concluding that the parties had agreed that a court, instead of an arbitrator, would decide the arbitrability of plaintiff's claims.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order denying defendant's motion to compel arbitration and dismiss.

REVERSED.

Judges McCULLOUGH and INMAN concur.

BANK OF AMERICA, N.A., PLAINTIFF
v.
CHRISTOPHER HARVEY RICE, DAVID HALVORSEN, HALEY BECK HILL, JENNIFER BURKHARDT-BLEVINS, MARK GROW, AND UBS FINANCIAL SERVICES, INC., DEFENDANTS

No. COA15-251

Filed 15 December 2015

1. Trials—new facts obtained during discovery—law of the case—not applicable

In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, the trial court erred by denying BOA's motion for summary judgment and granting defendant's cross-motion on its claims for breach of contract as to Notes 2 and 3. The trial court erroneously determined that the law of the case doctrine prevented BOA from enforcing Notes 2 and 3 as novations to the 2005 and 2006 notes. The previous appeal involved a different issue and occurred before discovery. Based on new facts obtained during discovery, there was no issue of material fact that BOA was the holder of the notes at the time of the novations and that defendant breached the terms of the contracts.

2. Pleadings—Rule 12 motions—documents referenced in defendant's counterclaims

In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, the trial court did not err by considering excerpts attached to BOA's Rule 12 motions from the compensation plans pursuant to which defendant sought payment in his counterclaim. The Court of Appeals rejected defendant's argument that the documents were extraneous to the pleadings and therefore should not have been considered in connection with BOA's Rule 12 motions. Because defendant expressly referenced these documents in his counterclaims, the trial court was not required to convert the Rule 12 motions into motions for summary judgment.

3. Pretrial Proceedings—Rule 12 motions—documents not referenced in pleadings

In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed

by defendant, the trial court erred by considering a document that was not referenced in the parties' pleadings when it ruled on BOA's Rule 12 motions. The error, however, was harmless error, as defendant failed to demonstrate how the document showing his negative performance review from 2010 related to the merits of his counterclaims.

4. Attorney Fees—breach of contract case—remand to trial court

In a case involving the entitlement of plaintiff Bank of America (BOA) to enforce novations to three promissory notes executed by defendant, where the Court of Appeals determined that BOA was entitled to summary judgment on Notes 2 and 3, the Court directed the trial court on remand to make a determination accompanied by appropriate findings as to BOA's entitlement to attorney fees in connection with its enforcement of the notes.

Appeal by defendant Christopher Harvey Rice from order entered 20 November 2014 by Judge Richard D. Boner in Mecklenburg County Superior Court and appeal by plaintiff from order entered 20 November 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 August 2015.

Williams Mullen, by Michael C. Lord and Kelly Colquette Hanley, for plaintiff.

Johnston, Allison & Hord, P.A., by Martin L. White and Munashe Magarira, for defendant Christopher Harvey Rice.

DAVIS, Judge.

This case involves a dispute regarding the entitlement of Plaintiff Bank of America, N.A. ("BOA") to enforce novations to three promissory notes executed by Defendant Christopher Harvey Rice ("Rice").[1] BOA appeals from an order entered by Judge W. Robert Bell granting summary judgment in favor of Rice regarding BOA's attempt to enforce two of the novations. Rice appeals from an order entered by Judge Richard D. Boner granting both BOA's motion for judgment on the pleadings on

1. While the caption in one of the orders giving rise to this appeal lists additional parties besides Rice as defendants, none of these other defendants are parties to the present appeal.

its claim arising from the third novation and BOA's motion to dismiss Rice's counterclaims. After careful review, we (1) affirm the order of Judge Boner; (2) reverse the order of Judge Bell; and (3) remand for additional proceedings.

Factual Background

This matter is before us for the second time. The underlying facts giving rise to this action are set out more fully in *Bank of Am., N.A. v. Rice*, __ N.C. App. __, 750 S.E.2d 205 (2013) ("*BOA I*"), and are quoted in pertinent part as follows:

> On 24 September 2004, [BOA's] corporate affiliate BAI [Banc of America Investment Services, Inc.] hired [Rice] as an employee. On this same date [Rice] and [BAI], entered into an agreement entitled "BAI SERIES 7 AGREEMENT[.]" The BAI Series 7 Agreement contained provisions regarding the following general topics: "employment 'at-will[,]' " "customer lists and other proprietary and confidential information[,]" "non-solicitation covenants[,]" "right to an injunction[,]" "compliance with applicable laws, rules, policies and procedures[,]" "hold harmless[,]" "arbitration[,]" "assignment[,]" "non-waiver[,]" "invalid provisions[,]" "choice of law[,]" and "terms and modifications[.]" (Original in all caps.)
>
> . . . .
>
> [O]n 24 September 2004, [Rice] executed a promissory note payable to [BOA], not BAI ("2004 Note"). The 2004 Note provided for [Rice] to pay to [BOA] the sum of $500,000.00, to be paid in six separate annual payments between 2005 and 2010. . . . For the following two years, [Rice] executed substantially similar promissory notes . . . but these two notes are payable to BAI, not [BOA]. The promissory note from 2005 was for $219,928.50, payable from 2006 to 2011 ("2005 Note") and the promissory note from 2006 was for $219,928.50, payable from 2007 to 2012 ("2006 Note").
>
> On 4 May 2010, [BOA] entered into three "PROMISSORY NOTE NOVATION AGREEMENT[S;]" ("2010 Novations"). The 2010 Novations all stated they were between [BOA], not BAI, and [Rice] and they were "replac[ing]" the prior 2004 Note, 2005 Note, and 2006 Note; the 2010 Novations . . . provided that

> [t]his Note contains the complete understanding between [Rice] and . . . [BOA] relating to the matters contained herein and supersedes all prior oral, written and contemporaneous oral negotiations, commitments and understandings between and among [BOA] and [Rice]. [Rice] did not rely on any statements, promises or representations made by [BOA] or any other party in entering into this Note.

. . . .

On 2 March 2011, [BOA] filed a "COMPLAINT, MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, AND MOTION FOR EXPEDITED DISCOVERY" against defendants, including . . . Rice, the only defendant in this appeal. (Original in all caps.) [BOA] summarized its allegations of the case as follows,

> This Complaint arises from [Rice's] breach of contract and misappropriation of [BOA's] confidential, proprietary and trade secret information which occurred at the time of [his] coordinated and abrupt resignation from [BOA's] U.S. Trust business on January 28, 2011. BOA is informed and believes that [Rice] continue[s] to breach [his] contractual duties and continue[s] to commit tortious acts by misappropriating [BOA's] confidential, proprietary and trade secret information (despite a demand for its return) and by soliciting certain clients and customers of [BOA's] U.S. Trust business. BOA is informed and believes that [Rice is] engaged in this misconduct for the benefit of UBS [UBS Financial Services, Inc.].

[BOA] brought claims for breach of contract, conversion, computer trespass, misappropriation of trade secrets, tortious interference with contractual relations, tortious interference with contractual relations with [BOA's] U.S. Trust business clients, unfair competition, and breach of the 2010 Novations of the promissory notes. On 23 April 2011, pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, [BOA] stipulated to dismissal of its first seven claims against [Rice] with prejudice; thus, the only

> remaining claim was for breach of the promissory notes identified in [BOA's] complaint as the 2010 Novations.
>
> On or about 31 May 2011, [Rice] filed a motion "to compel arbitration and stay litigation" contending that the "[o]riginal [p]romissory [n]otes [m]andate [a]rbitration" and "[BOA] is bound to [a]rbitrate even without [an] [a]rbitration [a]greement[.]" On or about 1 July 2011, [Rice] amended his motion, adding to his initial motion that "[t]he [a]mended [p]romissory [n]otes do not replace the [o]riginal [p]romissory [n]otes" and "[BOA] is bound to [a]rbitrate regardless of [the] language of [the] [a]mended [p]romissory [n]otes[.]" On 16 April 2012, the trial court denied [Rice's] amended motion.

Id. at __, 750 S.E.2d at 207-09 (emphasis omitted).

In *BOA I*, the sole issue before this Court was whether Rice was entitled to compel arbitration of BOA's claims against him because of the existence of arbitration clauses in the 2004, 2005, and 2006 notes despite the fact that no such clauses were contained in the 2010 novations. Rice argued that the 2010 novations were invalid and did not supersede the 2004, 2005, and 2006 notes because there was no mutuality of parties as between the 2010 novations and the original notes. We determined that the trial court had not erred in denying Rice's motion to compel arbitration. *Id.* at __, 750 S.E.2d at 211.

With regard to the 2004 note and its 2010 novation, we held as follows:

> [Rice] makes no specific argument regarding the 2004 Note, presumably because the 2004 Note was between [Rice] and [BOA], and the 2010 Novation "replac[ing]" the 2004 Note was also between [Rice] and [BOA]. Accordingly, the 2004 Note and the 2010 Novation both have the same parties, [Rice] and [BOA]. [Rice] has not attacked the 2010 Novation on any other ground. As the 2010 Novation replacing the 2004 Note stated that it is the entirety of the parties' agreement regarding the 2004 Note obligation it is replacing and as it does not contain an agreement to arbitrate, there was no agreement to arbitrate the 2004 Note since the 2010 Novation superseded any agreement the parties may or may not have made in the 2004 Note and/or the BAI Series 7 Agreement. Thus, the 2010 Novation as

> to the 2004 Note is a valid novation which is enforceable and not subject to arbitration.

Id. at __, 750 S.E.2d at 210 (internal citation omitted).

We also affirmed the portion of the trial court's order rejecting Rice's attempt to compel arbitration as to BOA's claims arising under the novations to the 2005 and 2006 notes but on a different ground.

> [Rice] contends that the 2005 Note and 2006 Note are between [Rice] and BAI, but the 2010 Novations "replac[ing]" those documents were between [Rice] and [BOA]; thus, contends [Rice], a valid novation could not have occurred because BAI was not a party to the 2010 Novations replacing the 2005 and 2006 Notes. This is correct.
>
> . . . .
>
> [BOA] . . . contends that "the parties' mutual performance under the New Notes confirms the novation." But the 2010 Novations would have to be confirmed by the performance of the original party to the 2005 and 2006 Notes, BAI. Any performance by [Rice] or [BOA] would not indicate that BAI, the original party to the 2005 Note and the 2006 Note which the 2010 Novation purportedly "replace[d,]" agreed to the 2010 Novations. Indeed, BAI is not even a party to this lawsuit. . . . Here, [BOA] has not directed us to nor are we aware of any action taken by BAI which shows acquiescence to the "replace[ment]" of its 2005 Note and 2006 Note with the 2010 Novations to which it was not a party. We conclude that the 2010 Novations regarding the 2005 Note and 2006 Note are invalid and unenforceable because BAI was not a party to the 2010 Novations purporting to "replace" the 2005 Note and 2006 Note, as the record does not contain any evidence indicating that BAI agreed, acquiesced, ratified or in any other form accepted the 2010 Novations purportedly "replac[ing]" the 2005 Note and 2006 Note. As such, the purported 2010 Novations between [BOA] and [Rice] had no effect upon the 2005 Note and 2006 Note. Both the 2005 Note and 2006 Note, which, we assume without deciding, are in full force and effect, contained arbitration provisions, but [BOA] has not brought any claim based upon the 2005 Note and 2006 Note. Furthermore, [BOA] is not even a party to the 2005

> Note or 2006 Note. Accordingly, [Rice] cannot compel arbitration as to [BOA's] claims under the 2010 Novations of the 2005 and 2006 Notes, because a valid novation could not occur without BAI and [BOA] was not a party to the 2005 Note and 2006 Note.

Id. at __, 750 S.E.2d at 210-11 (internal citations omitted).

We then summarized our holding as follows:

> In conclusion, we affirm the trial court's order denying arbitration as to the 2010 Novation regarding the 2004 Note, because the 2010 Novation includes the entire agreement of the parties as to the 2004 Note and that novation does not contain an arbitration provision. We further affirm the trial court's denial of arbitration as to [BOA's] claims based upon the 2010 Novations regarding the 2005 Note and 2006 Note, but for a different reason than the trial court; here we affirm because there is no claim as currently pled to be arbitrated. Because of the narrow issue presented in this appeal, we express no opinion on the enforceability of the 2005 Note, the 2006 Note, or the 2010 Novations.

Id. at __, 750 S.E.2d at 211.[2]

Following our decision in *BOA I*, the case was remanded to the trial court for further proceedings. Rice filed an answer to BOA's complaint on 10 February 2014, setting forth various affirmative defenses and asserting counterclaims for (1) breach of contract (in which Rice alleged he was entitled to compensation pursuant to certain incentive plans in effect between BOA and him); (2) quantum meruit; (3) unjust enrichment; (4) violation of North Carolina's Wage and Hour Act; and (5) unfair trade practices pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.*

On 17 April 2014, BOA filed (1) a motion to dismiss Rice's counterclaims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; and (2) a motion for judgment on the pleadings based on Rule 12(c) or, in the alternative, a motion for summary judgment pursuant to Rule 56 to enforce the 2010 Novations based on Rice's failure to make the payments to BOA required thereunder.

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2. Both of the orders that form the basis for the present appeal refer to (1) the 2010 novation of the 2004 note as "Note 1"; (2) the 2010 novation of the 2005 note as "Note 2"; and (3) the 2010 novation of the 2006 note as "Note 3." For the remainder of this opinion, we adopt these same shorthand references to the individual novations for the sake of consistency and ease of reading but on occasion refer to Notes 1, 2, and 3 collectively as "the 2010 Novations" for contextual clarity.

On 23 June 2014, a hearing on BOA's motions was held before the Honorable H. William Constangy in Mecklenburg County Superior Court. Following the hearing, Judge Constangy took the motions under advisement.

In the meantime, the parties continued to engage in discovery. During discovery, BOA produced documentation disclosing new information about events that had occurred between the signing of the original 2005 and 2006 notes and the execution of the 2010 Novations. These documents essentially showed the following: (1) In October 2009, BAI merged into Merrill Lynch, Pierce, Fenner and Smith, Inc. ("MLPF&S"), a subsidiary of Merrill Lynch; (2) MLPF&S therefore became the legal holder of the 2005 and 2006 notes originally entered into by Rice and BAI; and (3) BOA subsequently acquired Merrill Lynch and, as part of the acquisition, BOA acquired approximately 205 promissory notes held by MLPF&S, including the 2005 and 2006 notes.

On 12 September 2014, BOA filed a motion for summary judgment in which it sought to enforce Notes 2 and 3. In support of its motion, BOA submitted (1) the affidavit of Allen Bednarz, BOA's Director of Global Wealth & Investment Management Compensation Administration; (2) copies of the 2004, 2005, and 2006 notes; (3) copies of the 2010 Novations; (4) various records pertaining to Rice's compensation; (5) the affidavit of John Romano, BAI's Chief Financial Officer from 2006 through October 2009; (6) the affidavit of Donald Brock, the Controller of U.S. Trust (a subsidiary of BOA); (7) excerpts from Rice's deposition; and (8) Rice's interrogatory responses. On that same date, Rice filed a cross-motion for summary judgment supported by his own affidavit. In his cross-motion, he contended that in light of our decision in *BOA I* the law of the case doctrine precluded the trial court from finding that Notes 2 and 3 were legally effective novations of the 2005 and 2006 notes.

On 7 October 2014, a hearing on BOA's motion for summary judgment and Rice's cross-motion was held before the Honorable W. Robert Bell. On 20 November 2014, Judge Bell issued an order ("Judge Bell's Order")[3] granting Rice's cross-motion as to Notes 2 and 3 and denying BOA's motion. On that same date, the Honorable Richard D. Boner entered an order ("Judge Boner's Order") granting both BOA's motion to

3. Due to Judge Constangy's retirement subsequent to the 23 June 2014 hearing, the order was signed by Judge Boner pursuant to Rule 63 of the North Carolina Rules of Civil Procedure.

dismiss Rice's counterclaims pursuant to Rule 12(b)(6) and its motion for judgment on the pleadings as to Note 1 pursuant to Rule 12(c).[4]

On 10 December 2014, BOA filed a notice of appeal from Judge Bell's Order. On 29 December 2014, Rice gave notice of appeal as to Judge Boner's Order.

Analysis

I. Judge Bell's Order

[1] BOA argues that Judge Bell erred in denying its motion for summary judgment and granting Rice's cross-motion on its claims for breach of contract as to Notes 2 and 3. We agree.

> On appeal, this Court reviews an order granting summary judgment *de novo*. The entry of summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A trial court may enter summary judgment in a contract dispute if the provision at issue is not ambiguous and there are no issues of material fact.

Malone v. Barnette, __ N.C. App. __, __, 772 S.E.2d 256, 259 (2015) (internal citations and quotation marks omitted).

BOA contends that the trial court inappropriately utilized the law of the case doctrine in reaching its conclusion that BOA was not entitled to enforce Notes 2 and 3 as novations to the 2005 and 2006 notes. Rice, conversely, argues that the doctrine was correctly applied because *BOA I* definitively established that Notes 2 and 3 were not legally effective novations to the 2005 and 2006 notes.

The law of the case doctrine provides that

> when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which

4. Judge Boner's Order denied judgment on the pleadings as to BOA's breach of contract claims regarding Notes 2 and 3. Furthermore, although BOA's 17 April 2014 motions had included, in the alternative, a motion for summary judgment, all of the rulings contained in Judge Boner's Order were based on Rule 12.

> were determined in the previous appeal are involved in the second appeal.

Hayes v. City of Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956).

"The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure. However, the general rule only applies to issues actually decided by the appellate court. The doctrine of law of the case does not apply to dicta, but only to points actually presented and necessary to the determination of the case." *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (internal citations and quotation marks omitted), *disc. review denied*, 352 N.C. 672, 545 S.E.2d 420 (2000). Notably, for purposes of the present appeal, "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." *State v. Lewis*, 365 N.C. 488, 505, 724 S.E.2d 492, 503 (2012).

> The rule that a decision of an appellate court is ordinarily the law of the case, binding in subsequent proceedings, is basically a rule of procedure rather than of substantive law, and must be applied to the needs of justice with a flexible, discriminating exercise of judicial power. Therefore, in determining the correct application of the rule, the record on former appeal may be examined and looked into for the purpose of ascertaining what facts and questions were before the Court.

Hayes, 243 N.C. at 537, 91 S.E.2d at 682 (internal citations omitted).

In urging us to uphold the trial court's application of the law of the case doctrine, Rice attempts to rely on language in *BOA I* stating that Notes 2 and 3 were not valid novations because (1) BAI — rather than BOA — had executed the 2005 and 2006 notes; and (2) BAI did not sign or ratify Notes 2 and 3. However, Rice ignores our express recognition in *BOA I* of the fact that based on the record before us at that time there was no "indication that the 2005 and 2006 Notes were ever transferred by BAI to [BOA]." *BOA I*, __ N.C. App. at __ n. 7, 750 S.E.2d at 211 n. 7. That is no longer the case.

Our decision in *BOA I* was issued in the context of a bare factual record due to the fact that the appeal in *BOA I* was taken before the parties had begun discovery. Following our decision, based on new facts obtained during discovery conducted between the parties, BOA

submitted unrebutted affidavit testimony in support of its motion for summary judgment establishing that because of BOA's acquisition of the 2005 and 2006 notes, BAI was no longer the holder of these notes at the time the 2010 Novations were executed and, for this reason, was not required to ratify them. Thus, the present record on appeal contains facts that had not yet been discovered at the time of *BOA I*, and — as a result — the observations we made in *BOA I* forming the basis for Rice's present argument no longer conform to the factual record before us. *See State v. Paul*, __ N.C. App. __, __, 752 S.E.2d 252, 254 (2013) ("The law of the case principle does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." (citation and quotation marks omitted)).

It is also worthy of emphasis that our decision in *BOA I* explicitly recognized that the only issue actually before this Court was whether Rice was entitled to compel arbitration of BOA's claims against him. *See BOA I*, __ N.C. App. at __, 750 S.E.2d at 211 (affirming trial court's denial of motion to compel arbitration and "express[ing] no opinion" on various additional issues "[b]ecause of the narrow issue presented in this appeal"). None of the issues in the present appeal require us to reexamine our prior ruling on the discrete issue decided in *BOA I* relating to whether BOA's claims must be arbitrated. For all of these reasons, the law of the case doctrine does not control our decision in the present appeal as to whether BOA was entitled to summary judgment on its claims to enforce Notes 2 and 3 as novations to the 2005 and 2006 notes.

Nor has Rice identified any legal impediment to the acquisition of the 2005 and 2006 notes by BOA. "The general rule is that contracts may be assigned. The principle is firmly established in this jurisdiction that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that a contract for money to become due in the future may be assigned." *Hurst v. West*, 49 N.C. App. 598, 604, 272 S.E.2d 378, 382 (1980) (citation and quotation marks omitted). Furthermore, an "assignment operates as a binding transfer of the title to the debt as between the assignor and the assignee regardless of whether notice of the transfer is given to the debtor." *Lipe v. Guilford Nat. Bank*, 236 N.C. 328, 331, 72 S.E.2d 759, 761 (1952); *see Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 652, 689 S.E.2d 889, 893 ("It has long been the law in North Carolina that the assignee stands absolutely in the place of his assignor, and it is as if the contract had been originally made with the assignee, upon precisely the same terms as with the original parties." (citation, quotation marks, and ellipses omitted)), *disc. review denied*, 364 N.C. 324, 700 S.E.2d 748 (2010).

Based on the factual record currently before us, it is clear that BOA, not BAI, was the holder of the 2005 and 2006 notes at the time of the 2010 Novations. As such, BAI was no longer an interested party with regard to the notes at that time and was not legally entitled to receive notice of the 2010 Novations or required to ratify them in order for them to constitute valid novations.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002) (citation and quotation marks omitted), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003). In support of its motion for summary judgment, BOA not only submitted competent evidence explaining its acquisition of the 2005 and 2006 notes prior to the execution of the 2010 Novations but also provided the following: (1) the 2005 and 2006 notes (signed by Rice); (2) Notes 2 and 3 (signed by Rice); (3) the deposition testimony of Rice in which he admitted that he had not paid the outstanding balances owed on Notes 2 and 3; and (4) the affidavit of Brock, who testified as to the precise amounts still owed on Notes 2 and 3 as of 2 October 2014. Rice has failed to make any valid argument refuting BOA's evidence that Notes 2 and 3 are legally enforceable novations to the 2005 and 2006 notes. Therefore, having established both that it was the real party in interest entitled to enforce Notes 2 and 3 and that Rice breached the terms thereof, BOA demonstrated that no genuine issue of material fact existed and that it was entitled to summary judgment on its claims as to Notes 2 and 3.

Accordingly, we reverse the order of Judge Bell denying BOA's motion for summary judgment as to its claims based on Notes 2 and 3 and granting Rice's cross-motion. We remand to the trial court for the entry of summary judgment in favor of BOA as to these claims.

II. Judge Boner's Order

We next address Rice's appeal of Judge Boner's Order granting both BOA's Rule 12(c) motion for judgment on the pleadings as to BOA's breach of contract claim regarding Note 1 and BOA's Rule 12(b)(6) motion to dismiss Rice's counterclaims. Rice's sole argument on this issue is procedural in nature, claiming that the trial court committed reversible error by considering documents extraneous to the pleadings in ruling on BOA's Rule 12 motions without converting them into motions for summary judgment. We disagree.

It is well settled that "[b]oth a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief

can be granted should be granted when a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief." *Robertson v. Boyd*, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988).

> Rule 12(b) provides that a motion to dismiss for failure to state a claim under Rule 12(b)(6) shall be treated as one for summary judgment and disposed of as provided in Rule 56 where matters outside the pleading are presented to and not excluded by the court in ruling on the motion. Rule 12(c) contains an identical provision, stating that if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Horne v. Town of Blowing Rock, 223 N.C. App. 26, 30, 732 S.E.2d 614, 617 (2012) (internal citations, quotation marks, and brackets omitted).

"If, however, documents are attached to and incorporated within a complaint, they become part of the complaint. They may, therefore, be considered in connection with a Rule 12(b)(6) or 12(c) motion without converting it into a motion for summary judgment." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). This is due to the fact that

> [t]he obvious purpose of . . . Rule 12(b) is to preclude any unfairness resulting from surprise when an adversary introduces extraneous material on a Rule 12(b)(6) motion, and to allow a party a reasonable time in which to produce materials to rebut an opponent's evidence once the motion is expanded to include matters beyond those contained in the pleadings.

Coley v. N.C. Nat. Bank, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979).

In *Coley*, the plaintiffs asserted that the trial court erred by considering materials outside the pleadings in ruling on the defendants' Rule 12(b)(6) motion to dismiss the plaintiffs' claim for fraudulent inducement without giving the plaintiffs a reasonable time in which to present additional materials in opposing the motion. *Id.* The plaintiffs argued that because the court considered materials outside of the pleadings — namely, the contract at the heart of the plaintiffs' fraudulent inducement claim — the motion should have been converted into a motion for summary judgment under Rule 56. *Id.* In rejecting the plaintiffs' argument,

we noted that the plaintiffs had specifically referred to the contract at issue in their complaint and that, for this reason, the trial court was not required to convert the matter into a summary judgment motion.

> Certainly the plaintiffs cannot complain of surprise when the trial court desires to familiarize itself with the instrument upon which the plaintiffs are suing because the plaintiffs have failed to reproduce or incorporate by reference the particular instrument in its entirety in the complaint. Furthermore, by considering the contract, the trial judge did not expand the hearing to include any new or different matters.

Id.

We elaborated on this principle in *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 554 S.E.2d 840 (2001).

> [T]his Court has stated that a trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party. This Court has further held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant.

Id. at 60, 554 S.E.2d at 847 (internal citations omitted).

Here, it is clear from the face of Judge Boner's Order that the trial court did not convert BOA's Rule 12 motions into motions for summary judgment. Moreover, the order expressly states that in ruling on BOA's motions the trial court considered

> the pleadings, the General Plan Provisions of the two incentive compensation plans specifically referred to in the counterclaims of [Rice] and which are the subject of his claims, the authorities cited by the parties, the "Judge's Notebook" submitted by [BOA], including the Memorandum of Law in support of [BOA's] Motion to Dismiss/Motion for Judgment on the Pleadings, and Exhibit A (redacted excerpts from the 2010 Plan), Exhibit B (excerpts from defendant's 2010 Score Card) and copies of fourteen cases, as well as the argument of counsel.

Rice contends that it was improper for the trial court to consider the excerpts attached to BOA's Rule 12 motions from the two compensation plans pursuant to which Rice sought payment in his counterclaims — the "U.S. Trust, Bank of America Private Wealth Management 2010 U.S. Trust Private Client Advisor/Private Client Manager Incentive Plan" ("the 2010 PCA Incentive Plan") and the U.S. Trust "2011 Compensation Plan Overview" (collectively "the Incentive Plans").

Rice claims the trial court similarly erred in considering Exhibits A and B to the "Judge's Notebook" submitted by BOA. The Judge's Notebook consisted of a memorandum of law and copies of various cases along with two attached exhibits. Exhibit A was an additional excerpt from the 2010 PCA Incentive Plan. Exhibit B was an excerpt from Rice's "2010 Scorecard," which indicated that Rice had been employed by BOA as a Private Client Advisor II in 2010 and had received a negative performance review.[5]

Rice does not contest the authenticity of either the excerpts from the Incentive Plans or the 2010 Scorecard. Instead, his only argument, as noted above, is that these documents were extraneous to the pleadings and, accordingly, should not have been considered in connection with BOA's Rule 12 motions. We address these documents in turn.

A. The Incentive Plans

[2] The fatal flaw with Rice's argument regarding the Incentive Plans is that — as Judge Boner's Order noted — Rice specifically referenced both plans in his counterclaims, alleging the following:

> 7. Pursuant to Plaintiff's Compensation Incentive Plans for its PCA's in 2010 and 2011, Mr. Rice was entitled to compensation in addition to his regular salary.
>
> 8. Mr. Rice was entitled to receive compensation pursuant to Plaintiff's Compensation Incentive Plan of at least $45,657.03 for services and work rendered during the fourth quarter of 2010. Said compensation should have been paid to Mr. Rice on or about February 28, 2011.
>
> 9. Mr. Rice was entitled to receive compensation pursuant to Plaintiff's Compensation Incentive Plan of at least $11,956.48 for services and work rendered during the first

5. The Judge's Notebook was apparently served on Rice five days prior to the 23 June 2014 hearing.

> quarter of 2011. Said compensation should have been paid to Mr. Rice on or about May 31, 2011.

We rejected an analogous argument in *Robertson*. In that case, the plaintiffs purchased a home from the defendants. In conjunction with the sale, the defendants provided the plaintiffs with a termite inspection report stating that the residence was free of any termite damage. After closing, however, the plaintiffs discovered that the house had, in fact, suffered termite damage. The plaintiffs therefore brought suit against the defendants for fraudulent misrepresentation and concealment and referenced the termite report in their complaint. *Robertson*, 88 N.C. App. at 439, 363 S.E.2d at 674.

The defendants filed a motion to dismiss as well as a motion for judgment on the pleadings. The trial court granted the defendants' motion to dismiss, and on appeal the plaintiffs argued that the trial court had impermissibly considered the termite report without converting the defendants' motion into a motion for summary judgment. *Id.* at 440-41, 363 S.E.2d at 674-75. In holding that the trial court did not err, we stated the following:

> Defendants in this case apparently utilized Rule 12(c) because they wanted the trial court to consider the termite report and the contract of sale in determining the sufficiency of plaintiffs' complaint. These documents were not submitted by plaintiff, but copies of both documents were attached to the answer and motion to dismiss of defendants Boyd and copies of the termite report were attached to the motions to dismiss of defendants Booth Realty and Go-Forth. Because these documents were the subjects of some of plaintiffs' claims and plaintiffs specifically referred to the documents in their complaint, they could properly be considered by the trial court in ruling on a motion under Rule 12(b)(6).

Id. at 440-41, 363 S.E.2d at 675.

Here, similarly, the Incentive Plans considered by the trial court were expressly referenced in Rice's own counterclaims. Consequently, the trial court's review of excerpts from these documents did not require the conversion of BOA's Rule 12 motions into motions for summary judgment.

B. Rice's 2010 Scorecard

[3] Unlike the Incentive Plans, Rice's 2010 Scorecard was not referenced in the parties' pleadings. Therefore, the excerpt from the 2010

Scorecard should not have been considered by the trial court in ruling on BOA's Rule 12 motions.

However, we are satisfied that the trial court's consideration of this document was merely harmless error. Rice has failed to demonstrate in his appellate brief how the 2010 Scorecard related to the merits of his counterclaims (or, for that matter, to the merits of BOA's breach of contract claim as to Note 1), and, therefore, he has not shown that he was actually prejudiced by the trial court's error.

Both of the Incentive Plans expressly provided that

> participants [under the PCA Incentive Plans] whose employment is terminated (either by [BOA] or the participant) prior to the payment date of an incentive award are no longer eligible to be Plan participants and as such, are not eligible to receive a Plan award or other incentive payment, subject to the requirements of applicable law.

BOA's primary argument as to why Rice was not eligible to receive the compensation sought in his counterclaims was that his resignation from BOA resulted in a forfeiture of his right to receive such compensation under the plain language of the plans.[6] In his brief to this Court, Rice has failed to articulate how the excerpt from the 2010 Scorecard related to the legal effect of his resignation on his eligibility to be compensated under the Incentive Plans.

Moreover, the trial court's entry of judgment on the pleadings in BOA's favor in connection with Note 1 was based solely on the undisputed fact that Rice was in default and had nothing to do with the contents of the 2010 Scorecard. Therefore, once again, Rice has failed to demonstrate any prejudice resulting from the court's consideration of that document. *See Cabaniss v. Deutsche Bank Secs., Inc.*, 170 N.C. App. 180, 184, 611 S.E.2d 878, 881 ("[P]laintiffs argue that the trial court wrongly considered documents outside the scope of the second amended complaint which were attached to the motion to dismiss. However, given plaintiffs' failure to comply with the demand requirements as discussed above, the court's consideration of the letter in making its ruling, while improper, was not prejudicial." (internal citation omitted)), *cert. denied*, 360 N.C. 61, 621 S.E.2d 176 (2005).

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6. Rice has not challenged on appeal the validity of the trial court's substantive ruling on this issue.

III. Attorneys' Fees

[4] The final issue in this appeal concerns BOA's contention that it is entitled to an award of attorneys' fees in connection with its enforcement of Notes 2 and 3. "The general rule in this state is a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 603, 632 S.E.2d 563, 575 (2006) (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 361 N.C. 350, 644 S.E.2d 5 (2007). N.C. Gen. Stat. § 6-21.2 provides, in pertinent part, as follows:

> Obligations to pay attorneys' fees upon any note . . . or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note . . . or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> . . . .
>
> > (2) If such note . . . or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note . . . or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2(2) (2013).

Notes 2 and 3 (like Note 1) each contain the following provision:

> **5. Payment.**
>
> . . . Where permitted by law, [Rice] shall reimburse [BOA] for any and all damages, losses, costs and expenses (including attorneys' fees and court or arbitrator costs) incurred or sustained by [BOA] as a result of the breach by [Rice] of any of the terms of this Note or in connection with the enforcement of the terms of this Note.

Judge Boner's Order granting BOA judgment on the pleadings as to Note 1 stated the following: "The award of [BOA's] costs, including its reasonable attorneys' fees, associated with the issues decided by this

Order will be determined in a subsequent motion proceeding." In light of our determination that BOA was entitled to summary judgment in connection with Notes 2 and 3, we direct the trial court on remand to make a similar determination accompanied by appropriate findings as to BOA's entitlement to attorneys' fees in connection with its enforcement of Notes 2 and 3.

Conclusion

For the reasons stated above, we (1) affirm Judge Boner's Order; (2) reverse Judge Bell's Order; and (3) remand for the entry of summary judgment in favor of BOA on its claims as to Notes 2 and 3 and for further proceedings in connection with BOA's motion for attorneys' fees.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Chief Judge McGEE and Judge ELMORE concur.

LEE FRANKLIN BOOTH, PLAINTIFF
v.
STATE OF NORTH CAROLINA, DEFENDANT

No. COA15-640

Filed 15 December 2015

1. Firearms and Other Weapons—felons—restoration of privileges—partial summary judgment

Plaintiff was not denied the right to seek redress of his grievances concerning the loss of firearms privileges by felons where he was convicted in 1981 of a non-aggravated kidnapping not involving a firearm, his right to possess a firearm was fully restored in 1990 by operation of the version of the North Carolina Felony Firearms Act (NC FFA) then in effect, and he received a pardon in 2001. Although subsequent amendments to the NC FFA prohibited possession of all firearms by any person convicted of felonies, without exceptions for people who had had their rights restored, the NC FFA was later amended again to provide an exception for those who had been pardoned or had their firearms rights restored. Plaintiff filed a Declaratory Judgment Action after the effective date of that amendment requesting a declaration that the NC FFA was unconstitutional and that plaintiff was exempt from the NC FFA due to his pardon,

and also requesting compensatory damages, costs, and attorney fees. The trial court granted plaintiff's motion for partial summary judgment, stating that the NC FFA did not apply to plaintiff due to his pardon. That ruling was upheld on appeal, and defendant was granted summary judgment on the remaining claims. Although plaintiff contended that he was denied the right to petition for redress of his grievances by the summary judgment for defendant because his constitutional claims were not addressed, plaintiff's right to seek redress of grievances does not entitle him to compel a ruling by the courts on each and every claim he sets forth, particularly when a court's determination on one issue renders another issue moot or unnecessary.

2. Declaratory Judgments—right to bear arms—felon—pardon—no controversy

Plaintiff's constitutional question concerning the right of a felon to bear arms was not reached where he was pardoned and exempted from the North Carolina Felony Firearms Act (NC FFA). The trial court entered an order that fully affirmed plaintiff's right to purchase, own, possess, or have in his custody, care, or control any firearm because of his exemption from the NC FFA by virtue of his pardon. No real or existing controversy remained upon entry of this order.

Appeal by plaintiff from order entered 12 February 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 November 2015.

Dan L. Hardway Law Office, by Dan L. Hardway, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for defendant-appellee.

TYSON, Judge.

Lee Franklin Booth ("Plaintiff") appeals from order granting summary judgment in favor of the State of North Carolina ("Defendant"). We affirm.

I. Factual and Procedural Background

In September 1981, Plaintiff pleaded guilty to one count of non-aggravated kidnapping. Plaintiff's crime did not involve the use of a

firearm. Plaintiff served a twenty-six-month term of imprisonment and was released from parole on 30 December 1985.

At the time Plaintiff was released from incarceration, N.C. Gen. Stat. § 14-415.1, the North Carolina Felony Firearms Act ("the NC FFA"), only prohibited the possession of "any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches" by persons convicted of certain felonies, mostly of a violent or rebellious nature, "within five years from the date of such conviction, or unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later." Act of June 26, 1975, ch. 870, sec. 1, 1975 N.C. Sess. Laws 1273.

Plaintiff's right to possess a firearm was fully restored on 30 December 1990, by virtue of the version of the NC FFA in effect at the time. On 5 January 2001, North Carolina Governor Hunt granted Plaintiff a Pardon of Forgiveness, subject to the conditions that Plaintiff "be of general good behavior and not commit any felony or misdemeanor other than a minor traffic offense and further upon the condition that this Pardon shall not apply to any other offense whereof the said party may be guilty."

The General Assembly subsequently amended the NC FFA in 2004 to prohibit the possession of *all* firearms by *any* person convicted of a felony, without regard to the date of conviction or the completion of the defendant's sentence, including while located within his or her own home and place of business. Act of July 15, 2004, ch. 186, sec. 14.1, 2004 N.C. Sess. Laws 716, 737. The 2004 amendment did not provide for any exceptions for individuals, such as Plaintiff, who previously had their right to possess firearms fully restored or who had been pardoned.

The General Assembly amended the NC FFA once again in 2010, effective 1 February 2011. The 2011 amendment provided for an exception to the application of the NC FFA under subsection (d): "This section does not apply to a person who, pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned or has had his or her firearms rights restored if such restoration of rights could also be granted under North Carolina law." N.C. Gen. Stat. § 14-415.1(d) (2013).

On 6 January 2012, Plaintiff filed a complaint against only the State of North Carolina under the Declaratory Judgment Act, and failed to name any individual defendants. N.C. Gen. Stat. §§ 1-253 *et seq.* He requested the following relief: (1) declaratory judgment that the NC FFA "is unconstitutional on its face and as applied to [P]laintiff under the provisions of the Constitutions of the United States and the State of North Carolina

and, consequently, had no effect at any time upon [P]laintiff's rights to keep and bear a legal firearm;" (2) declaratory judgment stating Plaintiff was exempt from the NC FFA "due to the fact that he holds a Pardon of Forgiveness for the only possible predicate offense;" (3) compensatory damages "for violation of his constitutional rights and for harm, loss and damage suffered;" and (4) costs and attorney's fees.

Plaintiff included numerous factual allegations regarding his behavior as an upstanding citizen since his release from incarceration. Plaintiff detailed his employment history as a "professional engineer and an entrepreneur." He provided certain services through his employment, which included "the overhaul and repair of high technology systems and components in the aerospace, space, maritime, and weapons industries[,]" serving "commercial and military clients both domestic and foreign."

Plaintiff stated in 2007, he "organized, and initially served as president of, a new business, Victory Arms, Inc., with a plan to design, develop and produce firearms." Plaintiff contended "[u]pon applying for a federal license to undertake such manufacturing, [he] discovered that the 2004 amendment to N.C. Gen. Stat. § 14.415.1 was being interpreted by the federal licensing authorities to prohibit issuing a license to [him]." Plaintiff subsequently resigned as president of the corporation and alleged he "has been prevented from being employed by, or obtaining any ownership interest in, Victory Arms, Inc." as a result of his inability to acquire a federal license.

Plaintiff averred he dispossessed himself of any and all firearms in order to comply with the NC FFA. Plaintiff alleged he

> suffered, and continues to suffer significant harm, including, but not limited to, loss of property, loss of freedom, loss of use of property, loss of a business, business opportunities, investment and business income, loss of the exercise of his constitutional rights, loss of security and the ability to protect himself and his family in his home and place of business, psychological and emotional stress and other serious and significant damage.

On 10 May 2012, Plaintiff filed a motion for partial judgment on the pleadings under N.C. Gen. Stat. § 1A-1, Rule 12(c) (2013), in which he requested the trial court rule upon "the issue of the legal effect of the Pardon of Forgiveness granted to Plaintiff[.]" The trial court entered an order allowing Plaintiff's motion for partial judgment on the pleadings on 27 September 2013. The order stated, in part:

> Given that the plaintiff had received his pardon from the governor of North Carolina . . . the Felony Firearms Act as amended simply *does not apply* to the plaintiff and thus cannot bar him from either possessing or bearing arms. Under this analysis, it is not necessary that the Court determine whether the Act is, as to this plaintiff, unconstitutional under an "*as applied*" challenge.

(emphasis supplied and in original).

The State appealed the trial court's order. Plaintiff cross-appealed, contending the trial court should have also allowed his motion to be granted as to his constitutional "as applied" challenge to N.C. Gen. Stat. § 14-415.1.

This Court issued an opinion affirming the trial court's order on 4 June 2013. *Booth v. State* (*Booth I*), 227 N.C. App. 484, 742 S.E.2d 637 (2013). This Court declined to address Plaintiff's constitutional argument, stating "North Carolina General Statute § 14-415.1 cannot be unconstitutional *as applied* to plaintiff, because it *does not apply* to him at all." *Id.* at 489, 742 S.E.2d at 640 (emphasis in original).

Our Supreme Court denied Defendant's petitions for discretionary review and writ of supersedeas by order entered 29 August 2013. *Booth v. State*, 367 N.C. 224, 747 S.E.2d 525 (2013). The trial court entered an order on remand on 13 December 2013, which restored Plaintiff's right to possess firearms.

Defendant filed a motion for summary judgment for all remaining claims. The trial court entered a written order granting summary judgment in favor of Defendant on 12 February 2015. Plaintiff gave timely notice of appeal to this Court.

II. Issues

[1] Plaintiff argues the trial court erred by granting summary judgment in favor of Defendant the State of North Carolina because: (1) doing so effectively violated Plaintiff's right to seek redress of grievances; (2) material issues of fact were in dispute regarding the violation of Plaintiff's constitutional rights between 1 December 2004 and 13 December 2013; and (3) material issues of fact were in dispute of whether Plaintiff was entitled to recover damages, if it was found that his constitutional rights were violated between 1 December 2004 and 13 December 2013.

III. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013); *see Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citation and internal quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

"In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (citation omitted).

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). This Court reviews an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

IV. Analysis

A. Plaintiff's Right to Seek Redress

Plaintiff argues he was denied his state and federal constitutional rights to seek redress of grievances by the trial court's 12 February

2015 order. Plaintiff contends his constitutional claims have "yet to be addressed by any court." This argument is without merit.

Plaintiff has not been precluded from filing his complaint in this action. Plaintiff's motion for partial judgment on the pleadings was not only heard by the trial court, but Plaintiff was afforded the declaratory relief he sought. This Court fully addressed Plaintiff's complaint in *Booth I*, and Plaintiff filed a conditional petition for discretionary review with our Supreme Court. Plaintiff also participated in the 20 January 2015 hearing on Defendant's motion for summary judgment. Plaintiff has been allowed access to the courts at every juncture in this action.

In *Booth I*, this Court noted "[a]lthough the [27 September 2012] order was addressing plaintiff's motion for partial judgment, the order actually disposed of the issues raised by plaintiff's complaint and is thus a final order." *Booth I*, 227 N.C. App. at 486, 742 S.E.2d at 638. The trial court and this Court in *Booth I* deemed it unnecessary to render a determination on the constitutionality of the NC FFA as applied to Plaintiff, in light of both courts' express declaration and judgment that the statute in question did not apply to Plaintiff by virtue of his pardon. *See State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955) ("[A]ppellate courts will not pass upon constitutional questions, even when properly presented, if there be also present some other ground upon which the case may be decided.") (citations omitted).

Plaintiff's right to seek redress of grievances does not entitle him to compel a ruling by the courts on each and every claim he sets forth, particularly when a court's determination on one issue renders another issue moot or unnecessary. Plaintiff has not been denied access to the courts and received the declaratory relief he sought. This argument is overruled.

B. Genuine Issues of Material Fact

[2] Plaintiff argues the trial court erred by granting summary judgment in favor of Defendant. He contends genuine issues of material fact exist of: (1) whether he was deprived of his constitutional right to bear arms from 2004 to 2013; and (2) whether he is entitled to damages, if it is determined his constitutional rights were violated. We disagree.

The Declaratory Judgment Act provides: "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined *any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder*." N.C. Gen. Stat. § 1-254 (2013) (emphasis

supplied). "[J]urisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984) (citations omitted).

> [A]ctions filed under the Declaratory Judgment Act . . . are subject to traditional mootness analysis. A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Typically, courts will not entertain such cases because it is not the responsibility to decide abstract propositions of law.

Hindman v. Appalachian State Univ., 219 N.C. App. 527, 530, 723 S.E.2d 579, 581 (2012) (citation and internal quotation marks omitted); *see Hoke Cnty. Bd. of Educ. v. State*, 367 N.C. 156, 159, 749 S.E.2d 451, 454 (2013) ("This Court consistently has refused to consider an appeal raising grave questions of constitutional law where, pending the appeal to it, the cause of action had been destroyed so that the questions had become moot.") (citation and internal quotation marks omitted); *Morris v. Morris*, 245 N.C. 30, 36, 95 S.E.2d 110, 114 (1956) (holding "a moot question is not within the scope of our Declaratory Judgments Act").

The trial court's 27 September 2012 order, affirmed by this Court in *Booth I*, determined the current version of N.C. Gen. Stat. § 14-415.1, which has been in effect since Plaintiff commenced this action, does not apply to Plaintiff. The trial court entered an order on remand in accord with *Booth I* on 13 December 2013, which fully affirmed Plaintiff's right to "purchase, own, possess, or have in his custody, care or control any firearm" because of his exemption from the NC FFA by virtue of his pardon. No "real or existing controversy" remained upon entry of this order. *Tucker*, 312 N.C. at 338, 323 S.E.2d at 303; *see Hoke Cnty. Bd. of Educ.*, 367 N.C. at 159, 749 S.E.2d at 454 ("When, as here, the General Assembly revises a statute in a material and substantial manner, with the intent to get rid of a law of dubious constitutionality, the question of the act's constitutionality becomes moot.") (citations and internal quotation marks omitted).

The law of this case has been adjudicated and declared. Plaintiff retains his right to bear arms and the NC FFA does not apply to him at this time. The trial court's 13 December 2013 order on remand effectively disposed of the remaining issues Plaintiff raised. No additional declaratory relief is available to Plaintiff at this time.

We hold Plaintiff has received the declaratory relief he sought and to which he is entitled. We decline to reach Plaintiff's constitutional question in this appeal.

> It is well established [sic] that appellate courts will not pass upon constitutional questions, even when properly presented if there is some other ground upon which the case can be decided, since the authority of the court to declare an act of the Legislature in conflict with the Constitution arises out of and as an incident of its duty to determine and adjudge the rights of parties to the litigation before it.

State v. Crabtree, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975) (citations omitted); *see also State v. Lewis*, 365 N.C. 488, 499, 724 S.E.2d 492, 497-98 (2012); *State v. Whaley*, 362 N.C. 156, 161, 655 S.E.2d 388, 391 (2008); *State v. Jones*, 296 N.C. 495, 503, 251 S.E.2d 425, 430 (1979).

Our decision does not foreclose Plaintiff's ability to file an action, in which he asserts claims against a state official or agency, in order to seek redress for his alleged constitutional violations.

V. Conclusion

Plaintiff's right to seek redress of his grievances was not violated or impaired. Plaintiff obtained the declaratory relief to which he is entitled upon the trial court's entry of its 13 December 2013 order. The law of this action has been adjudicated and declared. Under the applicable standard of review, the trial court did not err by granting summary judgment in favor of Defendant. The judgment appealed from is affirmed.

AFFIRMED.

Judges STROUD and DIETZ concur.

DALE BUCKNER, PLAINTIFF
v.
TIGERSWAN, INC., DEFENDANT

No. COA15-446

Filed 15 December 2015

Pretrial Proceedings—motion in limine hearing—summary judgment granted—no notice pursuant to Rule 56

Where plaintiff filed a lawsuit against his former employer alleging it was in default on two promissory notes, the trial court erred by entering summary judgment in favor of plaintiff. Plaintiff did not move for summary judgment, and defendant did not have the requisite 10-day notice of the hearing pursuant to Rule of Civil Procedure 56. Plaintiff and defendant only had notice that they were participating in a hearing regarding a motion in limine. The trial court's ruling could not be treated as a judgment on the pleadings since the court considered matters outside of the pleadings, and it could not be treated as a directed verdict since the parties were participating in a pretrial hearing and not a jury trial. The Court of Appeals reversed and remanded for a new hearing.

Appeal by defendant from Order entered 6 August 2014 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 October 2015.

MICHAEL W. STRICKLAND & ASSOCIATES, P.A., by Michael W. Strickland, for plaintiff.

MAGINNIS LAW, PLLC, by Edward H. Maginnis and T. Shawn Howard, for defendant.

ELMORE, Judge.

TigerSwan, Inc. (defendant) appeals from the trial court's Order for Summary Judgment in favor of Dale Buckner (plaintiff). After careful consideration, we reverse the trial court's Order and remand for a new hearing.

I. Background

In January 2012, plaintiff accepted the role of Director of Operations at TigerSwan, Inc., a company based in Apex that provides operational

risk management, training logistics, crisis management, business intelligence, and security counseling services. While plaintiff was employed by defendant, plaintiff loaned defendant money via two promissory notes. Defendant executed Note One on 5 March 2012 in the amount of $150,000, and it was due on 5 October 2012. Defendant executed Note Two on 17 April 2012 in the amount of $103,500, and it was due on 17 October 2012. In June 2012, plaintiff submitted his intent to resign in two weeks.

After plaintiff resigned, he filed a complaint on 11 January 2013 alleging that defendant was in default on the promissory notes. At the time plaintiff filed the complaint, he alleged defendant owed $7,337.47 pursuant to Note One, plus seven percent interest, and $103,500 pursuant to Note Two, plus six percent interest. Defendant filed an answer, including affirmative defenses and counterclaims, on 7 February 2013. Defendant pled the affirmative defenses of unclean hands, waiver, estoppel, and accord and satisfaction. Additionally, defendant pled the following counterclaims: breach of contract, breach of fiduciary duty, constructive fraud, unfair and deceptive trade practices, misappropriation of trade secrets, and temporary and permanent injunctive relief.

Plaintiff filed a motion for summary judgment on 4 April 2013. On 24 May 2013, plaintiff filed a notice of hearing, indicating that its motion would be heard on 30 May 2013. On 24 June 2013, the trial court denied plaintiff's motion for summary judgment, stating, "Plaintiff moved for Summary Judgment only upon its claim that Defendant breached the promissory note . . . . Plaintiff did not move for Summary Judgment upon the Counterclaims of Defendant . . . . Defendant did not move for Summary Judgment on its own claims."

On 7 April 2014, the trial court was scheduled to hear arguments on plaintiff's motion *in limine*, which related to defendant's counterclaims. After calendar call, defendant informed plaintiff that it was dismissing its counterclaims. During the hearing, after informing the court that defendant was dismissing its counterclaims, plaintiff requested an "opportunity to prepare another motion *in limine* based upon the lack of counterclaims" to exclude all evidence of damages and actions complained of in the counterclaims. Based on the foregoing, the trial court asked the parties to amend the pretrial conference order to reflect the current position, stating, "You can take as long as you want. You got at least 15 minutes." Counsel stated that they would need to go back to their offices, and the trial court informed them that they could handwrite the new order. At this time, defendant filed a voluntary dismissal of its counterclaims.

After the fifteen-minute recess, the trial court briefly allowed each side to present its position. Plaintiff argued, "This leaves then nothing before the Court but a suit on a promissory note where the parties have stipulated that it's valid and unpaid." Defendant argued that clause 3(v) in the promissory notes allows defendant to put on equitable defenses. The trial court asked each side to "provide for me what you think your evidence is going to show for the record [so] that I can consider that, plus whatever law you have, in determining whether we need to go further in this case, so that if I rule in his favor, everything's preserved[.]" The court asked plaintiff and defendant if they could "get all that done by 2:30[,]" and then it recessed for lunch.

Plaintiff and defendant both presented evidence, and the trial court concluded,

> For the purposes of this proceeding, I'm going to take all of the allegations of the defendant as true and will accept the undisputed stipulations of fact as set forth in the pretrial order. And based upon those two things would direct judgment in in [sic] favor of plaintiff in the amount of $103,500. Dismiss any claims of equitable principles as applies [sic] offsets or nullification of contract entered into between the parties on April the 17th, 2012.

Following the oral entry of judgment on 7 April 2014, the trial court entered an "Order for Summary Judgment" on 6 August 2014, which stated,

> With the dismissal of Defendant's Counterclaim, Defendant's only defenses are the affirmative defenses of unclean hands, waiver and estoppel[.] Defendant, having offered all of its exhibits and having offered a profer [sic] of its evidence, has failed to establish any material fact which would prevent entry of judgment in favor of Plaintiff.

Defendant appeals.

II. Analysis

A. The Trial Court's Order

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citing *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006)). Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (citing *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972)). "The motion shall be served at least 10 days before the time fixed for the hearing." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013).

Defendant argues that the trial court's order must be reversed and this case remanded because plaintiff did not move for summary judgment and defendant did not have the requisite ten-day notice of the hearing. We agree.

Plaintiff maintains that summary judgment may be entered without a motion, and alternatively, the court's judgment may be treated as a directed verdict or judgment on the pleadings. Plaintiff acknowledges that "[w]here no motion for summary judgment is filed and no notice given[,] a court's entry of summary judgment [has] been held improper[,]" citing *Britt v. Allen*, 12 N.C. App. 399, 183 S.E.2d 303 (1971). Nevertheless, plaintiff cites to *Erthal v. May*, 223 N.C. App. 373, 387, 736 S.E.2d 514, 523 (2012), for the proposition that, in certain circumstances, a party is not required to move for summary judgment to be entitled to it.

In *Erthal*, the defendants moved for partial summary judgment, and the trial court denied the defendants' motion and instead granted summary judgment in favor of the plaintiffs. *Id.* at 375, 736 S.E.2d at 516. On appeal, the defendants argued that the trial court lacked authority to grant summary judgment in favor of the plaintiffs because the plaintiffs did not file a motion for summary judgment and the defendants were not given the required ten-day notice. *Id.* at 387, 736 S.E.2d at 523. This Court stated, "Rule 56 does not require that a party move for summary judgment in order to be entitled to it[,]" citing *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C. App. 149, 151, 334 S.E.2d 499, 501 (1985), and "the trial court can grant summary judgment against the moving party." *Erthal*, 223 N.C. App. at 387, 736 S.E.2d at 523 (citing *Carriker v. Carriker*, 350 N.C. 71, 74, 511 S.E.2d 2, 5 (1999)). Moreover, we stated, "Our Supreme Court has previously held that even if the parties have only moved for partial summary judgment, it is not error for the trial court to grant summary judgment on all claims where both parties are given the opportunity to submit evidence on all claims before the trial court." *Id.* (citing *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 448 (1979)).

In contrast, here there was not a pending motion for full or partial summary judgment filed and noticed by at least one party. Instead, both plaintiff and defendant only had notice that they were participating in a hearing regarding a motion *in limine*. Although Rule 56 does not require a party to move for summary judgment to be entitled to it, it does require at least ten days' notice of the time fixed for the hearing.

In *Britt v. Allen*, cited by defendant, the trial court dismissed with prejudice the plaintiffs' claim and *sua sponte* entered "judgment as of nonsuit." 12 N.C. App. at 400, 183 S.E.2d at 303–04. On appeal, we stated, "Although not designated as such, the judgment appealed from amounted to a summary judgment." *Id.* at 400, 183 S.E.2d at 304. We noted that the "defendant made no motion for summary judgment" and "the judgment was entered on the court's own motion. Not only did defendants fail to move for summary judgment but plaintiffs were not given at least 10 days' notice before the time fixed for the hearing as required by Rule 56(c)." *Id.* at 400–01, 183 S.E.2d at 304. Accordingly, we held, "Since the procedure prescribed by Rule 56 was not followed, the judgment appealed from is erroneous." *Id.* at 401, 183 S.E.2d at 304 (citing *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E.2d 21 (1971); *Lane v. Faust*, 9 N.C. App. 427, 176 S.E.2d 381 (1970)).

Additionally, in *Zimmerman's Dept. Store v. Shipper's Freight Lines*, we stated, "Failure to comply with [the] mandatory 10 day notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule." 67 N.C. App. 556, 557–58, 313 S.E.2d 252, 253 (1984) (citing *Ketner v. Rouzer*, 11 N.C. App. at 488–89, 182 S.E.2d at 25). Although the plaintiff "had announced its readiness to proceed to trial, such readiness is in no way equivalent to readiness to respond to a motion for summary judgment." *Id.* at 558, 313 S.E.2d at 253. Thus, we concluded that the trial court erred in entering summary judgment for the defendants as they failed to comply with the notice requirement in Rule 56. *Id.*

"There is, we think, a sound reason for the mandatory form in which the 10-day requirement is expressed in the Rule." *Ketner*, 11 N.C. App. at 488, 182 S.E.2d at 25. Because defendant did not have the requisite ten-day notice under Rule 56, the trial court erred in entering summary judgment in favor of plaintiff.

B. Judgment on the Pleadings or Directed Verdict

Plaintiff alternatively claims that the trial court's order may be treated as a judgment on the pleadings or a directed verdict. We disagree.

Rule 12 of the North Carolina Rules of Civil Procedure states,

> (c) Motion for judgment on the pleadings.—After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2013). "No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings." *Lambert v. Cartwright*, 160 N.C. App. 73, 75, 584 S.E.2d 341, 343 (2003). Here, because the trial court considered matters outside of the pleadings, including arguments from both sides and a binder full of evidentiary materials from defendant containing a number of e-mails and other documents, we cannot treat the trial court's Order for Summary Judgment as a judgment on the pleadings under Rule 12.

A directed verdict is also inappropriate at this procedural posture. Under Rule 50 of the North Carolina Rules of Civil Procedure, a party may move for a directed verdict at the close of the evidence offered by the opponent and at the close of all of the evidence. N.C. Gen. Stat. § 1A-1, Rule 50(a) (2013). "[I]t is well settled that a motion for a directed verdict only is proper in a jury trial." *Dean v. Hill*, 171 N.C. App. 479, 482, 615 S.E.2d 699, 701 (2005); *see also Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 34, 604 S.E.2d 327, 332 (2004).

Plaintiff argues that in *Harvey and Son v. Jarman*, 76 N.C. App. 191, 199, 333 S.E.2d 47, 52 (1985), we held that the trial court has inherent power to direct a verdict where facts are admitted. Plaintiff, however, fails to mention that the case proceeded to a trial by jury, both parties put on evidence, and then the trial court entered a directed verdict. *Id.* at 193, 333 S.E.2d at 48–49. Here, the parties were in court for a pretrial hearing on a motion *in limine* and were not participating in a jury trial. Thus, it would be inappropriate to treat the Order for Summary Judgment as a directed verdict.

C. Questions of Fact

Defendant contends that should we determine it had sufficient notice to participate in a summary judgment hearing, it proffered

enough evidence to establish material issues of fact. Because summary judgment should not have been entered based on lack of notice under Rule 56, we do not reach the merits of this argument.

III. Conclusion

The trial court erred in entering summary judgment in favor of plaintiff because defendant did not have the requisite ten-day notice under Rule 56. We reverse and remand for a new hearing.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

MAURICE BURRIS, Petitioner
v.
KELLY J. THOMAS, Commissioner of North Carolina Division of Motor Vehicles, Respondent

No. COA15-312

Filed 15 December 2015

1. Motor Vehicles—voluntary chemical analysis—refused—involuntary blood draw

The trial court erred by concluding that a driver did not willfully refuse to submit to a chemical analysis where the driver refused the test and an involuntary blood draw was performed immediately after the refusal. What matters is whether the person was given the choice to voluntarily submit to the test and, after being given that choice, chooses not to voluntarily submit. At that point, the person has willfully refused. The fact that law enforcement might then conduct an *involuntary* chemical analysis has no bearing on the analysis of the request for a *voluntary* one.

2. Motor Vehicles—driving while impaired—implied-consent offense—defendant not seen driving car

DMV did not err by concluding that an officer had reasonable grounds to believe that defendant had committed an implied-consent offense. Even though the officer did not observe defendant driving the car, EMS personnel told the officer that defendant was removed from the driver's side of the car, the officer observed a strong odor of alcohol on defendant's breath at the scene, and defendant told

the officer on two separate occasions that he had had "quite a bit to drink."

3. Motor Vehicles—impaired driving—notice of implied consent rights

DMV did not err by concluding that an impaired driving defendant was given notice of his implied-consent rights where an officer read defendant the form while he was in the hospital and then held it up for defendant to read. Although defendant contended that one minute is not enough time to read the form, it consisted of only seven sentences.

4. Appeal and Error—preservation of issues—not raised below

Defendant's due process and double jeopardy arguments were not preserved for appellate review because defendant never raised these issues at a DMV hearing or on appeal to the trial court.

5. Constitutional Law—driving while impaired—warrantless, involuntary blood draw—after refusal of voluntary blood draw

A warrantless, involuntary blood draw from an impaired driving defendant did not violate the Fourth Amendment because the allegedly unconstitutional blood draw happened *after* defendant willfully refused the voluntary blood draw.

Appeal by respondent from order entered 19 December 2014 by Judge Forrest D. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 10 September 2015.

Chandler Law PLLC, by Jennifer M. Chandler, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for respondent.

DIETZ, Judge.

Petitioner Maurice Burris was involved in a car accident on 5 March 2013. Emergency personnel removed him from the driver's side of his car and placed him on a stretcher. A law enforcement officer noticed a strong odor of alcohol on Burris's breath. When the officer asked Burris how much he had to drink, Burris responded, "quite a bit." The officer later charged Burris with the implied-consent offense of driving while impaired.

Burris ultimately refused the officer's request to submit to a voluntary blood draw at the hospital after being informed of his implied-consent rights and the consequences of refusing to comply.

The North Carolina Division of Motor Vehicles revoked Burris's driver's license based on his refusal to voluntarily submit to a blood draw, finding that Burris was charged with an implied-consent offense; that the arresting officer had reasonable grounds to believe Burris had committed such an offense; that the officer notified Burris of his rights under N.C. Gen. Stat. § 20-16.2(a); and that Burris willfully refused to submit to a chemical analysis. Burris appealed to the trial court and the trial court ordered the DMV to rescind its revocation, holding that, because law enforcement immediately obtained a warrantless, involuntary blood draw after Burris refused to voluntarily submit, Burris's refusal was not "willful."

As explained below, the trial court's reasoning conflicts with this Court's precedent. A willful refusal occurs when a defendant purposefully makes a conscious choice not to submit to a chemical analysis. *See Seders v. Powell*, 298 N.C. 453, 461, 259 S.E.2d 544, 550 (1979). There is no requirement that, in order to be a "willful refusal," the refusal actually frustrate law enforcement's ability to obtain the chemical analysis. Here, although law enforcement compelled a warrantless, involuntary blood draw shortly after Burris refused to voluntarily submit, the DMV's findings support its conclusion that Burris willfully refused to voluntarily submit to the test.

We also reject Burris's alternative grounds for challenging the DMV's license revocation decision. The DMV's findings are supported by the record and those findings, in turn, support its conclusions of law. Accordingly, we reverse the trial court's order.

Facts and Procedural History

On 5 March 2013, Officer J.R. Ewers received a report of a car accident in Gastonia. When Ewers arrived at the scene, EMS personnel were attending to Petitioner Maurice Burris, who had been placed on a stretcher. EMS personnel informed Ewers that they had removed Burris from the driver's side of his vehicle. Once Ewers began speaking with Burris at the accident scene, he noticed a strong odor of alcohol on Burris's breath, and when Ewers asked Burris how much he had to drink, Burris responded, "quite a bit." Ewers was unable to conduct a field sobriety test because EMS needed to transport Burris to the hospital.

Officer Ewers arrived at the hospital shortly after Burris. While Burris was receiving medical care in an emergency room, Ewers again asked him how much he had to drink that night, and Burris again responded, "quite a bit." Ewers still detected a strong odor of alcohol on Burris's breath.

Based on these observations, Officer Ewers charged Burris with driving while impaired—an implied-consent offense. Ewers then orally advised Burris of his rights under N.C. Gen. Stat. § 20-16.2, a statute stating that any person who drives a vehicle on a public highway consents to chemical analysis if charged with an implied-consent offense. Ewers also held a written copy of these rights close to Burris's face so Burris could read them while he lay in the hospital bed. After Burris told Ewers that he understood these rights, Ewers asked Burris to submit to a blood test. Burris responded that he would not give his blood. Ewers then asked Burris if he was sure, and Burris replied that he did not want to submit to the blood test. Ewers marked Burris's response as a "willful refusal" on the applicable form. Shortly after, Ewers compelled Burris to provide a warrantless blood sample based on his conclusion that Burris would no longer be at the hospital by the time he could return with a warrant.

On 25 March 2013, the North Carolina Division of Motor Vehicles notified Burris that it was revoking his driver's license for willfully refusing to submit to a chemical analysis. Burris contested this revocation at a DMV hearing on 19 March 2014. The DMV upheld the revocation, concluding that all the statutory prerequisites for revocation were met—namely, that Burris was charged with an implied-consent offense; that Officer Ewers had reasonable grounds to believe Burris had committed such an offense; that Burris was notified of his rights under N.C. Gen. Stat. § 20-16.2(a); and that Burris willfully refused to submit to a chemical analysis.

Burris appealed the DMV's decision to the trial court, which ordered the DMV to rescind its revocation of Burris's license. The court concluded that the DMV hearing record failed to show that Burris willfully refused to submit to a chemical analysis. It reasoned that Burris "made a decision to refuse the 'request' for a blood draw, weighing the possible consequences as advised by the officer, but without the additional relevant consideration that his blood draw could be compelled without his consent." The court then reasoned that "[h]ad [Burris] been furnished with this additional information, there is a strong likelihood that he would have made a different decision. The 'choice' offered by the officer in this case was illusory." The DMV timely appealed the trial court's order.

Analysis

I. The DMV's Challenge to the Trial Court Decision

[1] On appeal, the DMV argues that the trial court erred because the DMV's findings of fact support its conclusion that Burris willfully

refused to submit to a chemical analysis. As explained below, we agree and therefore reverse the trial court's order.

"[O]n appeal from a DMV hearing, the superior court sits as an appellate court, and no longer sits as the trier of fact. Accordingly, our review of the decision of the superior court is to be conducted as in other cases where the superior court sits as an appellate court. Under this standard we conduct the following inquiry: (1) determining whether the court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Johnson v. Robertson*, 227 N.C. App. 281, 286-87, 742 S.E.2d 603, 607 (2013) (quotations omitted).

A superior court's review of a DMV license revocation decision is "limited to whether there is sufficient evidence in the record to support the [DMV's] findings of fact and whether the conclusions of law are supported by the findings of fact and whether the [DMV] committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e).

Here, the trial court ordered the DMV to rescind its revocation on the grounds that Burris did not willfully refuse to submit to a chemical analysis. Specifically, the trial court held that "the record fails to support the Petitioner willfully refused since Petitioner was unaware he had a choice to take or refuse the test." The court further explained that "Petitioner was read his rights under N.C.G.S. 20-16.2 and refused; however, blood was compelled immediately after the refusal. Therefore, there is a strong likelihood that Petitioner did not understand his rights with regard to the reality that he did not have a choice not to take the test."

The trial court's reasoning is erroneous. As the trial court acknowledged, the DMV found that Ewers read Burris his rights under the implied-consent laws, including his right to refuse to submit to a chemical analysis. The DMV also found that, after being informed of these rights, Burris refused to voluntarily submit to a blood draw. These findings are supported by the record. At the revocation hearing, Ewers testified that he read Burris his implied-consent rights and held a form listing these rights near Burris's face so Burris could read them. Ewers also testified that Burris told him that he understood these rights, then refused to submit to a blood test when asked.

The trial court rejected the DMV's finding of willful refusal not because it believed the DMV's findings were unsupported by the evidence, but because the court believed Burris's choice to refuse was "illusory." The court explained that, because law enforcement immediately compelled an *involuntary* blood draw for chemical analysis after

Burris refused a *voluntary* blood draw, "there is a strong likelihood that Petitioner did not understand his rights with regard to the reality that he did not have a choice not to take the test."

Our precedent does not support this reasoning. A willful refusal occurs when a person purposefully makes a conscious choice not to submit to a chemical analysis. *See Seders v. Powell*, 298 N.C. at 461, 259 S.E.2d at 550. Thus, "[a] finding that a driver 'did refuse' to take the test is equivalent to a finding that the driver 'willfully refused' to take the test." *Mathis v. North Carolina Div. of Motor Vehicles*, 71 N.C. App. 413, 416, 322 S.E.2d 436, 438 (1984).

Importantly, there is no requirement that, in order to be a "willful refusal," the refusal must frustrate law enforcement's ability to obtain the chemical analysis. That is what the trial court appears to have concluded by stating that one cannot "willfully refuse" a chemical test if "blood was compelled immediately after the refusal." What matters is whether the person was given the choice to voluntarily submit to the test and, after being given that choice, chooses not to voluntarily submit. At that point, the person has willfully refused. The fact that law enforcement might then conduct an *involuntary* chemical analysis has no bearing on the analysis of the request for a *voluntary* one. Indeed, one of the implied-consent rights that must be explained to a person from whom law enforcement request chemical analysis is that, even if the person were to refuse to submit to a chemical test, he might still be compelled to do so. *See* N.C. Gen. Stat. § 20-16.2(a)(1). The DMV found that Officer Ewers informed Burris of this fact and the record supports that finding. Accordingly, the trial court erred by rejecting the DMV's finding of willful refusal.

II. Burris's Alternative Arguments

[2] Burris asserts several alternative arguments that were not accepted by the trial court but would support reversal of the DMV's revocation order. As explained below, under the narrow standard of review applicable to appeals from license revocation hearings, we must reject these arguments.

Burris first contends that the DMV erred in concluding that Officer Ewers had reasonable grounds to believe that Burris committed an implied-consent offense as required by N.C. Gen. Stat. § 20-16.2(a) because Ewers never observed Burris driving a car. We disagree. The DMV's conclusion is supported by its factual findings that EMS personnel informed Ewers that Burris was removed from the driver's side of his vehicle; that Ewers observed a strong odor of alcohol on Burris's breath

at the accident scene; and that, on two separate occasions, Burris told Ewers that he had "quite a bit" to drink. *See Steinkrause v. Tatum*, 201 N.C. App. 289, 293, 689 S.E.2d 379, 381-82 (2009). These factual findings are taken directly from Officer Ewers's testimony at the revocation hearing and are therefore supported by the record.

[3] Burris next contends that the DMV erred in concluding that Burris was given notice of his implied-consent rights as required by N.C. Gen. Stat. § 20-16.2(a). Specifically, Burris argues that any notice he may have received was inadequate because he was lying in a hospital bed when Ewers read Burris his implied-consent rights and Ewers took only one minute to do so. Again, we disagree.

The DMV's conclusion that Burris was properly notified of his implied-consent rights is supported by its factual findings that Ewers read these rights to Burris and held a form containing these rights near Burris's face so Burris could read them. *See State v. Carpenter*, 34 N.C. App. 742, 744, 239 S.E.2d 596, 597 (1977). These factual findings are supported by the record. At the DMV hearing, Ewers testified that he read Burris his rights and held the rights form near Burris's face. Burris's argument that one minute is not enough time to properly read the implied-consent rights—which consist of only seven sentences—is a challenge to the DMV's factual finding that Officer Ewers read Burris those rights, and that finding is supported by the record and is thus conclusive on appeal.

[4] Burris also asserts several constitutional arguments on appeal, including that the involuntary blood draw violated his Fourth Amendment rights and that his license revocation violates his due process and double jeopardy rights under the Fifth and Fourteenth Amendments.

Burris's due process and double jeopardy arguments are not preserved for appellate review because Burris never raised these issues at the DMV hearing or on appeal to the trial court. *See State v. Waddell*, 130 N.C. App. 488, 503, 504 S.E.2d 84, 93 (1998).

[5] Burris raised his Fourth Amendment argument at the DMV hearing, but that argument is meritless. Even if law enforcement's warrantless, involuntary blood draw violated the Fourth Amendment, that allegedly unconstitutional blood draw happened *after* Burris willfully refused the voluntary blood draw. Moreover, the officer's determination that there were reasonable grounds to conclude Burris was driving while impaired were not based on the results of that subsequent blood draw. Thus, the subsequent warrantless blood draw, even if unconstitutional, has no impact on the outcome of this civil license revocation hearing.

Cf. Combs v. Robertson, __ N.C. App. __, 767 S.E.2d 925, 926 (2015); *Hartman v. Robertson*, 208 N.C. App. 692, 698, 703 S.E.2d 811, 816 (2010); *Quick v. North Carolina Div. of Motor Vehicles*, 125 N.C. App. 123, 127, 479 S.E.2d 226, 228 (1997).

Conclusion

For the reasons discussed above, we reverse the trial court's order.

REVERSED.

Judges HUNTER, JR. and DILLON concur.

IN THE MATTER OF T.N.G.

No. COA15-754

Filed 15 December 2015

1. Child Abuse, Dependency, and Neglect—neglected and dependent juvenile—jurisdiction

The trial court had jurisdiction under N.C.G.S. § 50A-201(a)(2) to adjudicate a juvenile neglected and dependent where the child had lived in North Carolina and South Carolina with various relatives; neither North Carolina nor South Carolina qualified as her home state; the evidence was undisputed that the child, her parents, and her grandparents (who were acting as parents) all were living in North Carolina; and substantial evidence was available in North Carolina concerning her care, protection, training, and personal relationships.

2. Appeal and Error—preservation of issues—not raised at trial court

Respondent's appellate argument in a juvenile neglect case that his due process rights were violated by adjudication in North Carolina based on events in South Carolina was not raised before the trial court and was not addressed by the Court of Appeals.

3. Child Abuse, Dependency, and Neglect—neglect adjudicated in North Carolina—acts in South Carolina

There was no fundamental unfairness where a child was adjudicated neglected in North Carolina based on acts in South Carolina. Although defendant argued that it was unfair for acts within the normative standards of parental fitness for another state to be used

in North Carolina to adjudicate the child neglected, there was no normative standard that would make the haphazard arrangements acceptable in either North Carolina or South Carolina.

4. Child Abuse, Dependency, and Neglect—adjudicated neglect—facts

The trial court did not err by adjudicating a juvenile neglected where she had been present when adults used marijuana, had to sleep with a boy who behaved inappropriately, and was passed from one adult to another without any determination by respondent that her successive caretakers were fit guardians.

5. Child Abuse, Dependency, and Neglect—dependent juvenile—no supporting findings

The trial court erred by adjudicating a child a dependent juvenile where the parties agreed that the trial court's decision would be based solely on the content of the trial court's conversations with the child in chambers, neither petitioner nor respondent presented evidence, there was no indication that the child attempted to provide the trial court with information about respondent's ability to care for her or that she would have been competent to do so, and the order contained no findings to support the conclusion that respondent was unable to provide for the care or supervision of the child.

6. Child Abuse, Dependency, and Neglect—dispositional authority—conditions—nexus

The trial court did not exceed its dispositional authority after adjudicating a juvenile dependent by ordering respondent to maintain stable employment, to obtain a domestic violence offender assessment, and to follow recommendations of the assessment. The record evidence established a nexus between the circumstances that led to the child's removal from respondent's custody and the trial court's dispositional order.

Appeal by respondent from order entered 16 March 2015 by Judge R. Les Turner in Greene County District Court. Heard in the Court of Appeals on 23 November 2015.

Baddour, Parker, Hine & Hale, P.C., by Helen S. Baddour, for petitioner-appellee.

Assistant Appellate Defender J. Lee Gilliam, Esq., for respondent-appellant.

Womble Carlyle Sandridge & Rice, LLP, by G. Criston Windham and Georgiana L. Yonuschot, for guardian ad litem.

ZACHARY, Judge.

Respondent-father appeals from an order adjudicating his daughter "Tanya"[1] to be a neglected and dependent juvenile. On appeal respondent argues that the trial court erred by assuming emergency jurisdiction over the case; that "as a matter of due process, North Carolina does not have jurisdiction over children who are alleged to have been neglected in other states"; that the trial court erred by adjudicating Tanya to be a neglected and dependent child; and that the trial court erred in its dispositional order. We hold that the trial court had jurisdiction over this matter, and that the trial court did not err by adjudicating Tanya to be neglected or in its dispositional order, but that the trial court erred by adjudicating Tanya a dependent juvenile.

I. Factual and Procedural Background

Tanya was born in North Carolina in September 2005, and between 2005 and 2009, Tanya lived in North Carolina with either her mother Kia Collins or her paternal grandparents, Mr. and Mrs. Harris ("her grandparents"). When Tanya began kindergarten she lived with her mother, also in North Carolina, but continued to visit her grandparents on weekends and during school vacations. In 2013 Tanya started living with respondent, and in November 2013 respondent traveled to South Carolina with Tanya. For the next few months, respondent and Tanya lived with respondent's half-brother, Mr. Griffin, and Mr. Griffin's girlfriend. At some point in 2014, respondent returned to North Carolina without Tanya, and after respondent's departure, Mr. Griffin took Tanya to live with Mr. Griffin's stepmother, Ms. Hunter, in Spartanburg, South Carolina. While Tanya stayed with Ms. Hunter, she shared a bed with two other children: a girl and a seven year old boy. The younger boy tried to kiss Tanya and touch her private parts on several occasions, but Tanya successfully rebuffed the child's behavior. In May 2014, Ms. Hunter asked her mother-in-law, Ms. Grady, if she "want[ed] a little girl." Ms. Grady agreed to take Tanya and accordingly Tanya was moved again, this time to stay with Ms. Grady, also in South Carolina. Ms. Grady was seventy-eight years old and had limited mobility. In September 2014, Ms. Grady decided that she could no longer care for Tanya, due to Ms. Grady's advanced age

1. To protect the juvenile's privacy, we refer to the child by the pseudonym "Tanya."

and health limitations. Ms. Grady contacted Tanya's grandparents in North Carolina, who came to South Carolina in late September 2014 and removed Tanya to their home in Greene County, North Carolina.

On 3 October 2014, Tanya's grandparents contacted the Greene County Department of Social Services ("DSS") to report that they had brought Tanya from South Carolina to Greene County, North Carolina, after their son, respondent, had left Tanya in South Carolina. On 16 October 2014, DSS conducted a meeting that was attended by respondent and Tanya's grandparents, but not by Tanya's mother. At the meeting, respondent admitted that he had left Tanya in South Carolina and that he was not presently employed. On 16 October 2014, DSS filed a juvenile petition alleging that Tanya was a neglected and dependent juvenile. DSS was awarded non-secure custody of Tanya and she was placed in the home of her grandparents.

On 21 October 2014, the trial court held a hearing on respondent's motion to dismiss the petition for lack of subject matter jurisdiction. The trial court found that Tanya was left in South Carolina by respondent, transported back to North Carolina by her grandparents, and that no juvenile or domestic action concerning the juvenile was pending in South Carolina. The court concluded that it had temporary, emergency jurisdiction pursuant to N.C. Gen. Stat. § 50A-204 and denied respondent's motion to dismiss. The court continued nonsecure custody with DSS and placement with her grandparents. On 16 February 2015, the court conducted an adjudication and disposition hearing. On 16 March 2015, the trial court entered an order adjudicating Tanya as a neglected and dependent juvenile. The court's disposition order continued legal custody with DSS and placement of Tanya with her grandparents, established a plan of reunification with respondent, and directed respondent to take certain actions. Respondent appealed.

II. Jurisdiction

[1] Respondent argues first that the court erred by exercising emergency jurisdiction in violation of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Respondent argues that the court lacked emergency jurisdiction because there was no evidence that Tanya had been abandoned or that there was an emergency. We conclude that the trial court had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2) and therefore have no need to reach the issue of whether the trial court also had emergency jurisdiction.

The issue of a court's subject matter jurisdiction may be raised for the first time on appeal. *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646

S.E.2d 425, 429 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). Whether a court has jurisdiction is a question of law reviewable *de novo* on appeal. *In re K.U.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010). Under the *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

"In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009). The UCCJEA is a jurisdictional statute, and its provisions must be satisfied in order for a court to have authority to adjudicate abuse, neglect and dependency petitions filed under the Juvenile Code. *In re Brode*, 151 N.C. App. 690, 692, 566 S.E.2d 858, 860 (2002). In making this determination, we are not restricted to consideration of the jurisdictional basis cited by the trial court. *Gerhauser v. Van Bourgondien*, __ N.C. App. __, __, 767 S.E.2d 378, 384 (2014) ("whether the trial court should or should not have made any changes to the original order as to jurisdiction, our inquiry is still the same: we must review *de novo* whether there was any ground for the exercise of subject matter jurisdiction under the UCCJEA").

N.C. Gen. Stat. § 50A-201(a) provides in relevant part:

> Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State; [or]
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under G.S. 50A-207 or G.S. 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a

> significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships[.] . . .

N.C. Gen. Stat. § 50A-102(7) defines a child's "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." In this case, it is undisputed that Tanya, her parents, and her grandparents all lived in North Carolina from the time of Tanya's birth, with the exception of a ten month period from November 2013 through September 2014, when Tanya and respondent were in South Carolina. "We generally determine jurisdiction by examining the facts existing at the time of the commencement of the proceeding." *Gerhauser*, __ N.C. App. at __, 767 S.E.2d at 390. This proceeding was commenced on 16 October 2014 with DSS's filing of a petition alleging that Tanya was a neglected and dependent juvenile. At that time Tanya had been back in North Carolina for a few weeks. In this circumstance, neither South Carolina nor North Carolina was Tanya's "home state," because neither was "the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding."

Because neither North Carolina nor South Carolina was Tanya's home state at the time the petition was filed, jurisdiction was not conferred on either state by the language in N.C. Gen. Stat. § 50A-201(a)(1) granting jurisdiction to a state that is "the home state of the child on the date of the commencement of the proceeding." N.C. Gen. Stat. § 50A-201(a)(1) also establishes jurisdiction for a state that "was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]" Although South Carolina was Tanya's home state "within six months before the commencement of the proceeding" and Tanya was absent from South Carolina when the petition was filed, no "parent or person acting as a parent" was living in South Carolina when the petition was filed. As a result, neither North Carolina nor South Carolina had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1).

N.C. Gen. Stat. § 50A-201(a)(2) confers jurisdiction to a state if "[a] court of another state does not have jurisdiction under subdivision (1) . . . and:

> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships[.]

In this case neither North Carolina nor South Carolina was Tanya's home state and the evidence is undisputed that (1) Tanya, her parents, and her grandparents (who were "acting as" parents) all were living in North Carolina, and (2) substantial evidence was available in North Carolina concerning Tanya's "care, protection, training and personal relationships."

> If there is no home state, N.C. Gen. Stat. § 50A-201(a)(2) then directs that "a court of this State has jurisdiction to make an initial child-custody determination" where [a.] The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and [b.] Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships. This jurisdiction is normally referred to as 'significant connection' jurisdiction.

Gerhauser, __ N.C. App. at __, 767 S.E.2d at 390. We conclude that the trial court had jurisdiction under N.C. Gen. Stat. § 50A-201(a)(2). Having reached this conclusion, we have no need to address the parties' arguments concerning emergency jurisdiction.

III. Evidence of Events Occurring in South Carolina

[2] Respondent argues next that his state and federal right to due process was violated by Tanya's adjudication as neglected based on evidence of events that occurred in South Carolina, because respondent had no power to subpoena witnesses from South Carolina. In addition, respondent contends that it is "fundamentally unfair for a parent who is within the normative standards of parental fitness in another State . . . to be deprived of his fundamental liberty interest in his child by the courts of North Carolina because the acts committed in the other State were considered [to] be below the normative standards of fitness in North Carolina." We disagree.

Respondent bases his appellate argument on an alleged violation of his right to due process under the North Carolina and United States

Constitutions. Respondent did not raise this issue before the trial court, or make any argument concerning his constitutional right to due process. "[I]t is well settled that a constitutional issue not raised in the lower court will not be considered for the first time on appeal. We therefore decline to address this issue." *In re S.C.R.*, 198 N.C. App. 525, 530, 679 S.E.2d 905, 908 (citing *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009).

[3] Respondent also asserts that it is "fundamentally unfair" for Tanya to be adjudicated neglected based on events that occurred in South Carolina, on the grounds that his "parental fitness" was "within the normative standards" of South Carolina, but his actions are "considered to be below the normative standards of fitness in North Carolina." Assuming, *arguendo*, that two states could have differing "normative standards" of "parental fitness" as related to neglect of children, respondent fails to identify any differing "normative standards" relevant to the present case. It is undisputed that after respondent left Tanya in South Carolina, she was shifted among various adults whose relationship to the child was increasingly attenuated. Eventually, Tanya was sent to live with a seventy-eight year old woman who was respondent's half-brother's stepmother's mother-in-law. We discern no "normative standard" that would make such a haphazard arrangement acceptable in either North Carolina or South Carolina. This argument is without merit.

IV. Adjudication of Neglect

[4] Respondent next contends that the court erred by concluding that Tanya was a neglected juvenile. We disagree.

N.C. Gen. Stat. § 7B-101(15) defines a "neglected juvenile" in relevant part as a "juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned . . . or who lives in an environment injurious to the juvenile's welfare[.]" "This Court has 'required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline' in order to adjudicate a juvenile neglected." *In re C.M.*, 198 N.C. App. 53, 63, 678 S.E.2d 794, 800 (2009) (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted), and citing *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)).

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2013). " 'The role of this Court in

reviewing a trial court's adjudication of neglect and abuse is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]' 'If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.' " *In Re S.C.R.*, 217 N.C. App. 166, 168, 718 S.E.2d 709, 711 (2011) (quoting *In Re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (internal quotation omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008)).

In this case, respondent asserts that the facts found by the trial court do not support its conclusion of law that Tanya is a neglected juvenile. The trial court's findings included the following:

> 2. That the juvenile is in the custody of [DSS] and has been placed with Charles and Velma Harris.
>
> 3. That the Court has talked with the juvenile in chambers with the consent of the father, the Guardian *ad Litem* and the petitioner.
>
> . . .
>
> 5. That the mother of the juvenile has taken no part in this matter.
>
> . . .
>
> 9. That the juvenile has been sexually abused on at least 5 occasions and was sleeping in the bed with a male.
>
> 10. That in South Carolina the father of the juvenile left the juvenile with "Grandma Shirley" and "Grandma Mamie" and when the juvenile was at "Grandma Shirley's" house she slept in the same bed as a 7 year old boy.
>
> 11. That the juvenile was left in the house of the uncle and the juvenile saw the uncle using marijuana in her presence and had seen the father using marijuana also.
>
> . . .
>
> 13. That the father went to North Carolina while the juvenile was in South Carolina.
>
> 14. That the father would, on occasion, fall asleep on the couch and could not be awakened.

. . .

16. That the juvenile has had a switch used on her bottom.

Respondent's challenge to the evidentiary support for these findings is limited to his argument that the evidence does not support the trial court's characterization of Tanya's interactions with her younger cousin as "sexual abuse." The evidence showed that while Tanya stayed with Ms. Hunter, Tanya shared a bed with two other children, including her younger seven year old male cousin. Tanya's cousin tried on five occasions to kiss Tanya or touch her private parts, but Tanya was able to rebuff the child's behavior. Regardless of whether these incidents between two young children rise to the level of "sexual abuse," we conclude that this circumstance is significant evidence that Tanya "d[id] not receive proper care [or] supervision[.]" We further determine that the trial court's findings support a conclusion that Tanya was a "juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned . . . or who lives in an environment injurious to the juvenile's welfare[.]" In addition, we conclude that the trial court's findings that, *inter alia*, Tanya had been present when adults used marijuana, had to sleep with a boy who behaved inappropriately, and was passed from one adult to another without any determination by respondent that Tanya's successive caretakers were fit guardians, establishes that Tanya was at a "substantial risk of harm or impairment." We conclude that the trial court did not err by adjudicating Tanya a neglected juvenile and that respondent's arguments on this issue lack merit.

V. Adjudication of Tanya as a Dependent Child

[5] Respondent next contends that the court erred by adjudicating Tanya a dependent juvenile. A juvenile is dependent if his "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2013). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the [trial] court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (citation omitted).

In this case, the parties agreed that the trial court's decision on adjudication would be based solely on the content of the trial court's

conversations with Tanya in chambers. Therefore, neither petitioner nor respondent presented evidence. There is no indication in the record that Tanya attempted to provide the trial court with information about respondent's ability to care for her, or that she would have been competent to do so. We agree with respondent that the order contains no findings to support the trial court's conclusion that respondent is unable to provide for the care or supervision of Tanya. We therefore reverse the adjudication that Tanya is a dependent juvenile.

VI. Dispositional Order

[6] Respondent lastly maintains that the court exceeded its dispositional authority by ordering respondent to maintain stable employment and to obtain a domestic violence offender assessment and follow recommendations of the assessment. We disagree.

N.C. Gen. Stat. § 7B-901 provides that the "dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile. . . . The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801[.]" "We review a dispositional order only for abuse of discretion. 'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.' " *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Nonetheless, the trial court's authority over the parents of a juvenile who is adjudicated as neglected is limited by N.C. Gen. Stat. § 7B-904, which provides that:

> (d1) At the dispositional hearing . . . the court may order the parent . . . to do any of the following: . . . (3) Take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent[.]

For a court to properly exercise the authority permitted by this provision, there must be a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication. *In re H.H*, ___ N.C. App. __, ___ , 767 S.E.2d 347, 353 (2014). In *H.H.*, we noted that the "[r]espondent-mother's inability to properly care for the juveniles may well be due to employment, financial, and/or housing concerns," but held that the trial court erred by

ordering the mother to maintain stable housing and employment where "the petitions did not allege and the district court did not find as fact that these issues led to the juveniles' removal from Respondent-mother's custody or formed the basis for their adjudications." *Id.* The present case is distinguishable from *H.H.*, in that the addendum to the petition states in pertinent part that:

> [Respondent] acknowledged that he left [Tanya] with Mamie Grady in South Carolina and did not bring her back to North Carolina when he came back here. [Respondent] reports that he is unemployed and unable to care for [Tanya] at this time. [Respondent] stated that he and his wife have reunited, information [that Respondent's] parents dispute, but [DSS] has concerns of their admitted domestic violence history. To ensure the safety and well-being of [Tanya, DSS] is requesting non-secure custody of [Tanya] and that she be allowed to remain in the home of [her grandparents.] (Emphasis added.)

The record evidence establishes a nexus between the circumstances that led to Tanya's removal from respondent's custody and the trial court's dispositional order directing respondent to maintain stable employment, to obtain a domestic violence assessment, and to cooperate with any recommendations. Accordingly, this argument lacks merit.

For the reasons discussed above, we conclude that the trial court's adjudication and disposition orders should be

AFFIRMED IN PART, REVERSED IN PART.

Judges McCULLOUGH and INMAN concur.

IN RE M.C.

[244 N.C. App. 410 (2015)]

IN THE MATTER OF M.C. AND A.C.

No. COA15-247

Filed 15 December 2015

Termination of Parental Rights—subject matter jurisdiction—children resided out of state

The Court of Appeals vacated four orders (an adjudication order and a disposition order terminating respondent's parental rights to his biological child) for lack of subject matter jurisdiction, even though respondent's legal basis for his argument on appeal was incorrect. The children resided and were located in Washington state at the time the petitions to terminate parental rights were filed.

Appeal by respondent-father from orders entered 1 December 2014 and 19 December 2014 by Judge L. Dale Graham in District Court, Alexander County. Heard in the Court of Appeals 28 October 2015.

Kimberly S. Taylor for petitioner-appellee mother.

Blackburn & Tanner, by James E. Tanner III, for respondent-appellant father.

No brief filed for guardian ad litem.

STROUD, Judge.

Respondent appeals from an adjudication order and a disposition order terminating his parental rights to his biological child A.C. ("Amy").[1] Respondent also appeals an adjudication order concluding that he is not the biological, legal, or adoptive father of, and thus has no parental rights to, M.C. ("Mandy") and a disposition order regarding Mandy. Because the children resided in Washington state at the time of the filing of the petition for termination of parental rights, the trial court did not have subject matter jurisdiction over the action to terminate parental rights and, we vacate all of the orders on appeal.

I. Background

Petitioner is the biological mother of Amy and Mandy (collectively, "the children"). Mandy was born 9 April 2002. Buddy Bentley ("Bentley"),

1. Pseudonyms are used throughout to protect the identity of the children.

Mandy's biological father, is not a party to this appeal. Petitioner and respondent were married on 2 November 2002. Amy was born to the marriage in December 2004 and respondent is Amy's biological father.

Petitioner joined the United States Army in July 2005 and arranged for the children to live with her parents during her basic training. Beginning in December 2005, while petitioner was deployed to South Korea, the children lived with respondent, respondent's girlfriend, and her eleven-month-old child, Cara. On 9 February 2006, DSS in Rowan County filed two juvenile petitions with respect to Amy, Mandy, and Cara. The Rowan County trial court entered an order adjudicating Amy and Mandy neglected and adjudicating Cara both neglected and abused.

Respondent appealed the Rowan County adjudication of Mandy, Amy and Cara as neglected juveniles. This Court affirmed the neglect adjudication as to all three children. *In re C.J.*, *M.C.*, *and A.C.*, 181 N.C. App. 605, 640 S.E.2d 448 (2007) (unpublished).

On 17 July 2006, while the neglect adjudication order for Mandy, Amy and Cara was still pending on appeal before this Court, the Rowan County trial court entered several orders granting the physical and legal custody of Mandy and Amy to petitioner and initially granting respondent supervised visitation with both children, and later, when petitioner and the children moved to Washington state, telephonic visitation. Petitioner and respondent were divorced on 28 September 2006. On 4 July 2007, petitioner married her current husband and moved to the State of Washington with both children. Since 2007, the children have lived with petitioner and her new husband in Washington.

During 2009 and 2010, respondent filed several motions in Rowan County regarding visitation and contempt, and the Rowan County court entered orders addressing these issues. On 1 June 2010, the Rowan County court entered its final review order and order terminating jurisdiction of the juvenile court and converting the matter to a Chapter 50 action under N.C.G.S. § 7B-911. The court found that respondent had been exercising his telephonic visitation with the children after petitioner moved to Washington and that there were no changes in circumstances since the May 2006 hearing which would support a change in custody.

On 17 October 2011, in Alexander County, petitioner filed petitions to terminate respondent's parental rights to Mandy and Amy on the grounds of neglect, dependency, and abandonment. The first paragraph in both petitions alleges that "the Petitioner and minor child are citizens and residents of Washington State and have been citizens and residents

of Washington State for more than six (6) months preceding the filing of this action." The petitions were initially returned unserved, with a note that respondent lived in Iredell County. Nearly two years later, on 16 August, 2013, an alias and pluries summons was issued to respondent, and the summons and petition were served on respondent on 20 August 2013. On 29 August 2013, respondent filed an answer to the petition and alleged various defenses, including that petitioner would not permit him to exercise his telephonic visitation as required by the Rowan County order and that he had offered to pay child support but petitioner refused to accept it. On 4 November 2013, respondent filed a motion to dismiss the petition to terminate his parental rights based upon a lack of jurisdiction, alleging that the court did not have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

On 5 February 2014, the Alexander County court entered an order denying respondent's motion to dismiss. The trial court found that the Rowan County court had issued its first order regarding custody of the minor children in 2006. Although the County court had issued an order in June 2010 terminating jurisdiction, it had only terminated jurisdiction of the juvenile court and had converted the matter to a Chapter 50 case under N.C.G.S. § 7B-911(b). The Alexander County court concluded that North Carolina had "exclusive continuing subject matter jurisdiction" under UCCJEA, since respondent continued to reside in North Carolina.

On 17 September 2014, respondent filed an amended answer to the petition, in which he alleged that he had filed an acknowledgement of paternity of Mandy on 1 July 2004 in Iredell County. He also acknowledged that he was not Mandy's biological father but denied that this fact would be a basis for termination of his parental rights.

On 1 December 2014, the trial court entered an order terminating the parental rights of Bentley, Mandy's biological father, and on the same day, the court entered another order which found that respondent is not "the biological, legal, or adoptive father of the minor child [Mandy]" and concluded that "the respondent has no parental right to the minor child [Mandy]" and decreed that "Respondent has no standing to contest a petition for termination of his parental rights to [Mandy] . . . and any objection to termination by this Respondent is dismissed with prejudice." The court also entered adjudication and disposition orders as to Amy. On 19 December 2014, the trial court terminated respondent's parental rights to Amy on the grounds of neglect, failure to pay a reasonable portion of her cost of care, and abandonment. Respondent filed notices of appeal from all four orders.

II. Subject Matter Jurisdiction

Respondent argues that the trial court lacked jurisdiction to enter its orders terminating respondent's parental rights to Amy and concluding he had no parental rights to Mandy. Respondent argues that the Rowan County court had jurisdiction over custody under the UCCJEA but that "the Alexander County court was not statutorily authorized to exercise such jurisdiction." Although respondent's proposed legal basis for the absence of jurisdiction is incorrect, he is correct that the trial court did not have subject matter jurisdiction over termination of parental rights. Even though respondent did not argue the correct statutory basis for the lack of subject matter jurisdiction, "[i]t is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008).

We review the issue of subject matter jurisdiction *de novo*:

> Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened. Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings.

Rodriguez v. Rodriguez, 211 N.C. App. 267, 270, 710 S.E.2d 235, 238 (2011) (citation omitted).

Respondent's argument is based upon the UCCJEA, which addresses the jurisdiction of a particular state to enter orders regarding child custody; it does not address which county or district within a state has jurisdiction. But North Carolina has a specific statute which governs subject matter jurisdiction over cases involving termination of parental rights. The relevant portion of N.C.G.S. § 7B-1101, which is entitled "Jurisdiction," provides that:

> The court shall have *exclusive original jurisdiction* to hear and determine any petition or motion relating to termination of parental rights to any *juvenile who resides*

> *in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.* The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent.

N.C.G.S. § 7B-1101 (2013) (emphasis added).

Our courts have long recognized the statutory jurisdictional requirement that the juvenile must reside in or be found in the district in which the petition is filed, or must be in the legal or actual custody of the department of social services or a licensed child-placing agency at the time of the filing of the petition to terminate parental rights. *See In re D.D.J.*, 177 N.C. App. 441, 442-43, 628 S.E.2d 808, 810 (2006) ("In other words, there are three sets of circumstances in which the court has jurisdiction to hear a petition to terminate parental rights: (1) if the juvenile *resides in* the district at the time the petition is filed; (2) if the juvenile *is found in* the district at the time the petition is filed; or (3) if the juvenile is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time the petition is filed." (emphasis in original)). In *In re Leonard*, this Court addressed the interplay between the Uniform Child Custody Jurisdiction Act[2] and the statute granting jurisdiction over termination of parental rights. *See In re Leonard*, 77 N.C. App. 439, 441, 335 S.E.2d 73, 74 (1985). In *Leonard*, the petitioner-mother left the state of North Carolina on 10 June 1984 to move to Ohio to join her new husband and took the parties' son with her. *Id.* Four days later, she filed a petition in Randolph County to terminate the father's parental rights. *Id.* Because the child resided in Ohio on the date of the filing of the termination petition, this Court vacated the termination order for lack of subject matter jurisdiction under N.C.G.S. § 7A-289.23.[3] *Id.* at 441, 335 S.E.2d at 74. The *Leonard* court noted

2. The UCCJA was later renamed the Uniform Child-Custody Jurisdiction and Enforcement Act and recodified as N.C.G.S. Chapter 50A, Article 2. The relevant provisions for the purposes of this case have not been changed.

3. N.C.G.S. § 7A-289.23 was later recodified and is now N.C.G.S. § 7B-1101, the current statute.

that the court must have jurisdiction under *both* the UCCJEA and this jurisdictional statute to have the power to adjudicate termination of parental rights.

> Before determining parental rights, the court must find under G.S. § 50A–3 that it has jurisdiction to make a child custody determination. G.S. § 7A–289.23. The court concluded that it would have jurisdiction to determine Michael Leonard's custody under G.S. § 50A–3 and this conclusion has not been contested. While a determination of jurisdiction over child custody matters will precede a determination of jurisdiction over parental rights, it does not supplant the parental rights proceedings. The language of the statute is that it shall not be "used to circumvent" Chapter 50A, not that it shall "be in conformity with" Chapter 50A.
>
> The result in this case is not absurd, but it is nonetheless unfortunate.

Id.

In this case, the very first allegation in the petitions to terminate parental rights is that the children "are citizens and residents of Washington State." This fact alone establishes the lack of subject matter jurisdiction for termination of parental rights. Respondent's answers admitted this allegation and all of the evidence and prior orders entered in Rowan County confirm its truth. Both children have resided in Washington state with petitioner since 2007; they did not reside in and were not found in Alexander County when the petition was filed on 17 October 2011. The children have never been in the legal or actual custody of the Alexander County Department of Social Services or any child-placing agency. The Alexander County court did not have subject matter jurisdiction over the petition for termination of parental rights under N.C.G.S. § 7B-1101, and the orders on appeal must be vacated.

III. Conclusion

Because we must vacate the four orders on appeal, both the adjudication and disposition orders as to Amy and Mandy, for lack of subject matter jurisdiction, we need not address the other issues raised by respondent's brief.

VACATED.

Judges CALABRIA and DAVIS concur.

INSPECTION STATION NO. 31327 D/B/A JIFFY LUBE NO. 2736, PETITIONER
v.
THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES AND THE HONORABLE ERIC BOYETTE, INTERIM COMMISSIONER OF MOTOR VEHICLES, RESPONDENTS

No. COA15-436

Filed 15 December 2015

Motor Vehicles—agency suspension of inspection station's license—failure to notify station pursuant to statute—subject matter jurisdiction

Where the Department of Motor Vehicles (DMV) suspended a Jiffy Lube's license as a result of an employee's acceptance of money to pass a vehicle with tinted windows on its State inspection, the trial court lacked subject matter jurisdiction to hear the administrative appeal from the DMV's decision because the agency failed to comply with the mandatory notice requirements of N.C.G.S. § 20-183.8F(a). Pursuant to the statute, the DMV was required to serve a Finding of Violation on the Jiffy Lube within five days of the completion of the investigation. The Court of Appeals reversed the decision of the trial court and remanded with instructions to vacate the final agency decision of the DMV.

Appeal by petitioner from orders entered 23 January 2015 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 October 2015.

Vandeventer Black LLP, by David P. Ferrell and Ashley P. Holmes, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for respondents.

BRYANT, Judge.

Where the trial court lacked subject matter jurisdiction to hear an administrative appeal because the agency failed to comply with mandatory notice requirements of the applicable statute, we reverse the judgment of the trial court with instructions to vacate the final agency decision.

Petitioner Jiffy Lube ("petitioner") is a motor vehicle emissions inspection station licensed by the North Carolina Department of Motor

Vehicles ("DMV") pursuant to N.C. Gen. Stat. § 20-183.4A and is located at 1200 Laura Village Drive, Apex, North Carolina 27502. Petitioner employed Jesse Glenn Jernigan, Jr. ("Jernigan") as an inspection mechanic, and DMV approved and licensed Jernigan as an inspection mechanic.

On 18 March 2011, Brenton Land ("Land") of Cary, North Carolina went to Fast Lube Plus on Kildaire Farm Road in Cary to have the annual State inspection performed on his vehicle. At approximately 4:35 PM on that day, Land's vehicle, a 2006 Lexus, was failed for State inspection based on the window tint of the vehicle.

Land then drove his vehicle to petitioner's place of business to have his car inspected again for its annual State inspection. Land believed there to be a person at this location who would pass his vehicle even with the window tint.

When Land arrived at petitioner's place of business, he spoke with an employee about passing the vehicle on the State inspection despite the window tint. Land was told that one of the employees at that location would do so, but that he would not be back in until Monday. The employee then told Land to wait for a minute. While he waited, another employee, Jernigan, approached Land and asked if Land needed a passing inspection on a vehicle with a window tint. Land affirmed that that was what he needed and that the vehicle had failed inspection at another location. Between the two of them, it was agreed that Land would pay $50.00 for Jernigan to pass the vehicle for annual State inspection despite its window tint.

Following his conversation with Jernigan, Land left petitioner's place of business and went to an ATM in an adjoining parking lot. Land took out money from the ATM to pay Jernigan to pass his vehicle. Jernigan then inspected Land's vehicle for State inspection and passed the vehicle despite its window tint. Following the improper inspection, completed around 5:11 PM, Jernigan accepted the $50.00 from Land. Land then paid $30.00 to petitioner for the improper State inspection.

Following these transactions, Inspector Richard M. Ashley ("Inspector Ashley") of the North Carolina Division of Motor Vehicles License and Theft Bureau was assigned an investigation concerning State inspections of a motor vehicle in Wake County. Inspector Ashley received reports showing that a vehicle failed inspection at one location and approximately thirty minutes later passed inspection at a different location. Based on this fact, Inspector Ashley went to speak with Land, the registered owner of the vehicle, and the technician, Jernigan, who performed the passing inspection.

Land informed Inspector Ashley that he had removed the window tint after the failed inspection at Fast Lube. Land was questioned regarding how he got from Cary, where the first inspection took place, to Apex for the second inspection at petitioner's place of business and removed the window tint all in approximately thirty minutes. Land reiterated that he had removed the window tint before the second inspection.

Next, Inspector Ashley went to petitioner's place of business. Upon his arrival, Inspector Ashley spoke with the manager and advised him of why he was there. He then spoke with Jernigan, who told Inspector Ashley that he remembered the inspection in question and that all of the windows had been down on the vehicle when it pulled up, but that there was no window tint on the back window. Jernigan informed Inspector Ashley that the window tint meter was not working and that he went ahead and passed the vehicle on its State inspection. Jernigan also claimed that no money had exchanged hands for this improper inspection.

Inspector Ashley returned to speak with Land, told Land that he had talked with Jernigan about what happened, and that Land should now tell the truth. Land then admitted that he paid Jernigan $50.00 to pass his car on the State inspection despite the window tint. On 23 March 2011, Land gave a written statement to Inspector Ashley regarding what occurred, admitted to the improper inspection, and stated that he would have his window tint removed from his vehicle. On 24 March 2011, respondent-DMV, through Inspector Ashley, charged both Land and Jernigan criminally, specifically charging Jernigan with felony soliciting for accepting $50.00 from inspection customer Land to pass his 2006 Lexus despite having the windows tinted beyond legally approved levels.

On 25 March 2011, Jernigan gave a written statement to Inspector Ashley, wherein Jernigan admitted that he had accepted $50.00 to pass Land's vehicle for State inspection. As a result of the incident on 18 March 2011, Inspector Ashley initiated a civil license action against petitioner under N.C. Gen. Stat. § 20-183.7B(a)(9), which prohibits the solicitation or acceptance of "anything of value to pass a vehicle . . . ." On 2 June 2011, respondent-DMV served a Finding of Violation pursuant to N.C. Gen. Stat. 20-183.8F(a) on petitioner-Jiffy Lube.

On 28 June 2011, a Notice of Charge for petitioner-Jiffy Lube was served on petitioner by the Director of the DMV for a Type I violation, which occurred 18 March 2011. The Notice of Charge proposed to suspend petitioner's license for 180 days. In addition, the Notice of Charge imposed a $250.00 civil penalty against petitioner. Jernigan was terminated and is no longer employed by petitioner.

After receiving notice of the Type I violation, petitioner requested a hearing to appeal the violation to a DMV Hearing Officer. The matter was heard before DMV Hearing Officer Larry B. Greene, Jr. on 6 September 2012. The DMV Hearing Officer found Jernigan solicited money to pass the 2006 Lexus owned by Land when it would not have passed inspection if the window tint had been properly tested. The DMV Hearing Officer found that Jernigan's actions constituted a Type I violation. The DMV Hearing Officer then imputed the violation separately to petitioner, as the employer of Jernigan, pursuant to N.C. Gen. Stat. § 20-183.7A(c): "A violation by a safety inspection mechanic is considered a violation by the station or self-inspector for whom the mechanic is employed." N.C.G.S. § 20-183.7A(c) (2013).

The Official Hearing Decision and Order for the violation suspended petitioner's license for 180 days and assessed a $250.00 penalty against petitioner. Petitioner appealed this decision to respondent-DMV Commissioner pursuant to N.C. Gen. Stat. § 20-183.8G(e). On 4 December 2012, respondent-DMV Commissioner denied petitioner's appeal and upheld the DMV Hearing Officer's decision.

Petitioner timely filed a Petition for Judicial Review, and a hearing was held in the Superior Court of Wake County. On 7 April 2014, the trial court issued a written memorandum containing the trial court's ruling, which was to deny the petition and uphold the DMV suspension and fine. On 17 April 2014, petitioner timely filed a Motion to Reconsider. The trial court upheld its prior ruling and the order affirming the DMV suspension and fine was signed, filed, and served on 23 January 2015.

Despite upholding its prior ruling, in that same order, the trial court found that respondents did not timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a). However, the trial court found that the requirement to serve the Finding of Violation within five days of completion of an investigation was a directory requirement rather than a mandatory one. The trial court also upheld its prior ruling that the violation of service requirements in N.C.G.S. § 20-183.8F(a) did not deprive the trial court of subject matter jurisdiction as petitioner waived this argument by not bringing it up below. Therefore, the trial court denied petitioner's Motion to Reconsider. Petitioner appeals.

On appeal, petitioner argues that DMV's failure to comply with the statutory notice requirements of N.C. Gen. Stat. § 20-183.8F(a) are grounds for dismissal of the administrative action against Jiffy Lube. We agree.

Article 4 of Chapter 150B defines the judicial review process, and, within that, N.C. Gen. Stat. § 150B-51(b) establishes the scope of review as follows:

> The court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by the substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2013).

"In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 386, 628 SE.2d 1, 2–3 (2006) (citation omitted).

When determining whether an agency decision is arbitrary or capricious, or whether the agency decision is unsupported by substantial evidence in view of the entire record as submitted, this Court's standard of review is the "whole record test." *See Cromwell Constructors, Inc. v. N.C. Dep't of Env't, Health, & Natural Res.*, 107 N.C. App. 716, 719, 421 S.E.2d 612, 613–14 (1992). "When utilizing the whole record test . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (citation and quotation marks omitted).

When a petitioner alleges that an agency violated his constitutional rights, acted in excess of the statutory authority or jurisdiction of the agency, or the agency decision is affected by other error of law, *de novo*

review is the appropriate standard of review. *See Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988). "When the issue on appeal is whether a state agency erred in the interpretation of a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Id.* (quoting *Brooks v. Grading Co.*, 303 N.C. 573, 580–81, 281 S.E.2d 24, 29 (1981) (internal quotation marks omitted). Additionally, a reviewing court (the trial court, when sitting as an appellate court), may make findings at variance with an agency when it determines that the findings of the agency are not supported by substantial evidence. *Scroggs v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 101 N.C. App. 699, 702–03, 400 S.E.2d 742, 745 (1991) (citation omitted).

Under the version of N.C. Gen. Stat. § 20-183.8F(a) applicable to this case,

> [w]hen an auditor of the Division finds that a violation has occurred that could result in the suspension or revocation of an inspection station license, a self-inspector license, a mechanic license, or the registration of a person engaged in the business of replacing windshields, the auditor must give the affected license holder written notice of the finding. *The notice must be given within five business days after completion of the investigation that resulted in the discovery of the violation.* The notice must state the period of suspension or revocation that could apply to the violation and any monetary penalty that could apply to the violation. The notice must also inform the license holder of the right to a hearing if the Division charges the license holder with the violation.

N.C. Gen. Stat. § 20-183.8F(a) (2009) (emphasis added) (repealed by S.L. 2011-145, § 28.23B(a), eff. July 1, 2011).

In order to resolve the ultimate issue raised by petitioner on appeal, this Court must first address three sub-issues: (1) whether the trial court's finding of fact regarding respondent's failure to timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a) is supported by substantial evidence and should stand; (2) if indeed the trial court's finding of fact regarding respondent's failure to timely serve petitioner with a Finding of Violation is supported by substantial evidence, whether the language in N.C. Gen. Stat § 20-183.8F(a) regarding the time restrictions for notice is mandatory or directory; and (3) if the language in N.C. Gen. Stat. § 20-183.8F(a) is in fact mandatory, whether

respondent's failure to comply with the notice requirement of the statute results in a lack of respondent-DMV's subject matter jurisdiction over this matter, and independently is grounds for dismissal of the charges and administrative action against petitioner.

First, we agree with petitioner that respondents did not timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a). Applying the "whole record test" to petitioner's claim, we find that the trial court's finding as to that issue is supported by substantial evidence.

As stated above, the trial court, when sitting as an appellate court, may make findings at variance with an agency when it determines that the findings of the agency are not supported by substantial evidence. *Scroggs*, 101 N.C. App. at 702–03, 400 S.E.2d at 745. In the Official Hearing Decision and Order, the Hearing Officer found that "[p]ursuant to N.C. Gen. Stat. § 20-183.8F, written notice of the complaint made was furnished to the licensee within the statutory timeline . . . ."

In reviewing the whole record, however, the trial court found that there was not competent or substantial evidence to support a finding by the Hearing Officer that DMV complied with N.C. Gen. Stat. § 183.8F(a). Specifically, Inspector Ashley's own testimony before the DMV Hearing Officer provided no evidence of any further investigative action pertaining to either the mechanic (Jernigan), or the station (petitioner Jiffy Lube), that took place after 25 March 2011. Therefore, it appears the investigation was completed as of 25 March 2011. Consequently, respondent-DMV's service on 2 June 2011 of the Finding of Violation was outside the five-day period required by statute.

When asked to recount the events that led him to file the complaint against the station and the mechanic, Inspector Ashley recounted investigation attempts that occurred prior to and on the date of 25 March 2011. On 23 March 2011, Brenton Land, the individual who paid for the illegal inspection, made a voluntary statement, written by Land on a North Carolina Division of Motor Vehicles License and Theft Bureau official form. On 24 March 2011, Inspector Ashley charged Jernigan with felony soliciting in Wake County. On 25 March 2011, Jernigan made a voluntary statement from the Wake County Jail using the same NCDMV form that Land used.

When asked what documents Inspector Ashley wanted to offer as evidence, Inspector Ashley presented only the statements of Land and Jernigan, taken on 24 and 25 March 2011, respectively. Inspector Ashley did not testify as to any separate investigation of Jiffy Lube, nor did

respondent-DMV offer any evidence that the investigation went beyond the initiation of the civil license action on 18 March 2011, the filing of criminal charges on 24 March 2011, or the taking of Jernigan's statement on 25 March 2011.

The Hearing Officer's Finding of Fact that DMV had satisfied the requirements of N.C. Gen. Stat. § 20-183.8F(a) was not supported by evidence in the record before it. The trial court's finding of fact that respondent-DMV did not timely serve the Finding of Violation, on the other hand, is based on competent evidence. From the record, it appears the investigation into this matter was completed as of 25 March 2011, once Jernigan was charged by DMV with felony soliciting. Once Jernigan, the safety-inspection manager employed by petitioner, was determined to have committed a violation, such violation was imputed to petitioner. *See* N.C.G.S. § 20-183.7A(c) (2013) ("A violation by a safety inspection mechanic is considered a violation by the station or self-inspector for whom the mechanic is employed."). There is no indication based on statutory requirements or evidence in the record that any additional investigation of petitioner was necessary or performed. Accordingly, we agree with the trial court's finding that respondents failed to timely serve petitioner with a Finding of Violation pursuant to N.C. Gen. Stat. § 20-183.8F(a).

In determining whether the trial court correctly found that the requirement to serve a Finding of Violation within five days of the completion of an investigation under N.C. Gen. Stat. § 20-183.8F(a) is a directory requirement rather than a mandatory one, we review this issue *de novo*: When the issue is whether a state agency erred in the interpretation of a statutory term, a court may freely substitute its judgment for that of the agency and employ *de novo* review. *Brooks*, 91 N.C. App. at 463, 372 S.E.2d at 344.

The North Carolina Supreme Court has explained that:

> [i]n determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory. . . . While, *ordinarily, the word "must" and the word "shall," in a statute are deemed to indicate a legislative intent to*

> *make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action*, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute.

State v. House, 295 N.C. 189, 203, 244 S.E.2d 654, 661–62 (1978) (emphasis added) (citations omitted) (internal quotation marks omitted). "As used in statutes, the word 'shall' is generally imperative or mandatory." *State v. Johnson*, 298 N.C. 355, 361, 249 S.E.2d 752, 757 (1979) (citing *Black's Law Dictionary* 1541 (4th rev. ed. 1968)).

Additionally, this Court has stated that

> Mandatory provisions are jurisdictional, while directory provisions are not. . . . Whether the time provision . . . is jurisdictional in nature depends on whether the legislature intended the language of that provision to be mandatory or directory. . . . Generally, statutory time periods are . . . considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period.

In re B.M., M.M., An.M., & Al.M., 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005) (internal citations and quotation marks omitted). Here, respondent argues that because the legislature provided no consequence for failing to timely serve a Finding of Violation in N.C.G.S. § 20-183.8F(a), the statute is "clearly" directory. We disagree.

This Court has previously found that deadlines placed upon an administrative body subject to the Administrative Procedures Act ("APA") are mandatory where the statute involves an administrative proceeding that is penal in nature. *In re Trulove*, 54 N.C. App. 218, 222, 282 S.E.2d 544, 547 (1981). A statute which empowers a board or licensing agency to revoke a license is penal in nature. *See Parrish v. N.C. Real Estate Licensing Bd.*, 41 N.C. App. 102, 105, 254 S.E.2d 268, 270 (1979).

In *Trulove*, this Court reversed a license suspension issued by the North Carolina State Board of Registration for Professional Engineers and Land Surveyors where the licensing board failed to conduct its hearing within the time period required by statute. *Trulove*, 54 N.C. App. at 220, 224, 282 S.E.2d at 546, 548 (involving N.C. Gen. Stat. § 89C-22(b) (1975), which required that "[a]ll charges, unless dismissed by the Board as unfounded or trivial, *shall* be heard by the Board within three months after the date on which they shall have been *referred*" (emphasis added)).

The licensing board and process at issue in *Trulove*, like the DMV and process here, were governed by the fairness and notice provisions of the APA, N.C. Gen. Stat. § 150B, *et seq.* Furthermore, the statute at issue in *Trulove*, like the statute at issue here, did not contain any consequences for the Board's failure to conduct the hearing within the three month timeline. *See Trulove*, 54 N.C. App. at 220, 282 S.E.2d at 546. Although the statute at issue in *Trulove* contained no explicit consequences for the board's failure to hear cases within the three month timeframe, this Court recognized that where a statute contains language like "shall" and involves a proceeding that is penal in nature, statutory procedures are "mandatory [and] must be strictly followed." *Id.* at 220, 222, 282 S.E.2d at 546–47.

Just as in *Trulove*, the statute at issue here is penal in nature. *See* N.C.G.S. § 20-183.8F(a) ("When an auditor of the Division finds that a violation has occurred that could result in the *suspension or revocation of an inspection station license* . . . ." (emphasis added)). Furthermore, the same statute at issue here explicitly mentions that "[a] license issued to an inspection station . . . is a substantial property interest . . . ." N.C. Gen. Stat. § 20-183.8F(c).

Here, as in *Trulove*, at issue is the potential loss of a substantial property interest—a license. *See Trulove*, 54 N.C. App. at 219, 282 S.E.2d at 545. As noted above, this Court also did not require that any "dismissal" consequences be stated in the statute. Instead, because the *Trulove* case involved an administrative proceeding—specifically involving notice requirements for discipline against an occupational license holder—this Court recognized that the procedural requirements in the statute must be strictly followed and held that the Board acted without subject matter jurisdiction in hearing and ruling on the claim. *Id.* at 222, 282 S.E.2d at 547; *cf. N.C. State Bd. of Educ. v. N.C. Learns, Inc.*, ___ N.C. App. ___, ___, 751 S.E.2d 625, 630 (2013) (involving an agency's review period for an application submitted where the Board did not act on the application by the deadline, but concluding that "where a statute lacks specific language requiring an agency to take express action during a statutory review period, our Court has held that such statutory language is merely directory, rather than mandatory" (citation omitted)).

Here, the statute contains the following language, in pertinent part: "the auditor *must* give the affected license holder written notice of the finding. The notice *must* be given within five business days after the completion of the investigation that resulted in the discovery of the violation." N.C.G.S. § 20-183.8F(a) (emphasis added). "It is well established that the word 'shall' is generally imperative or mandatory," and likewise,

the word "must," like the word "shall," has generally been held to be mandatory as well: "The word 'shall' is defined as 'must' or used in laws, regulations, or directives to express what is mandatory." *Internet E., Inc. v. Duro Commc'ns, Inc.*, 146 N.C. App. 401, 405–06, 553 S.E.2d 84, 87 (2001) (quoting *Webster's Collegiate Dictionary* 1081 (9th ed. 1991)).

It is true that the N.C. Supreme Court has held that the words "must" or "shall" are not dispositive in the determination of whether or not a particular provision is mandatory rather than directory; "legislative intent is to be derived from a consideration of the entire statute." *House*, 295 N.C. at 203, 244 S.E.2d at 662. In looking to the legislative intent behind N.C.G.S. § 20-183.8F, in the version of the statute that immediately preceded the version at issue in this case, the DMV was required to issue a Finding of Violation "within five business days *after the violation occurred*." N.C. Gen. Stat. § 20-183.8F(a), 2001 N.C. Sess. Laws 2001-504, s. 17 (emphasis added). The statute was amended so that the start of the five day notice window would begin at the end of the DMV's investigation, rather than beginning when the violation occurred. *See id.* Notably, our legislature kept the mandatory notice process and the mandatory language ("must") regarding the five-day notice window. *See* N.C. Gen. Stat. § 20.183.8F(b).

By moving the start of the five-day notice window to the end of the DMV's investigation rather than leaving it at the date of the discovery of a violation, it appears that our legislature intended to give the DMV adequate time to complete its investigations in order to comply with this mandatory notice requirement. Such a change would not be necessary if the notice provision were not mandatory, or could be disregarded, as respondents contend. Additionally, the retention of the word "must" along with the five-day notice requirement further evidences our legislature's desire to continue the mandatory notice requirement that affects "a substantial property interest."

In addition, respondents' argument regarding the subsequent deletion of N.C. Gen. Stat. § 20-183.8F(a), effective 1 July 2011, is without merit. Respondents argue that "[i]f this statute was jurisdictional and contained mandatory action, clearly the legislature would not delete this subsection in its entirety. Respondents assert that this action by our General Assembly shows that this statute was "merely a courtesy," which had no effect on future proceedings. We disagree. If, in fact, the statute were directory, a "mere courtesy," as respondents argue, there would be no need for the legislature to delete it in its entirety. Rather than demonstrating that N.C. Gen. Stat. § 20-183.8F(a) is directory, if any conclusion is to be reached, our legislature's complete deletion of this

subsection undercuts respondents' argument and demonstrates that it was more likely intended to be mandatory.[1]

The plain language of N.C. Gen. Stat. § 20-183.8F(a), setting forth the penal nature of the proceeding it involves, and the recent deletion of subsection (a) from the statute by our legislature, support this Court's determination that the timing and notice requirements of N.C. Gen. Stat. § 20-183.8F(a) are mandatory, not directory.

Based on our conclusion that the language of N.C. Gen. Stat. § 20-183.8F(a) is mandatory and not directory, we finally reach the ultimate question at issue: whether respondents' failure to comply with the statutory notice requirements of N.C.G.S. § 20-183.8F(a) resulted in lack of subject matter jurisdiction and is grounds for dismissal of the administrative action against petitioner. Because the notice requirements of N.C.G.S. § 20-183.8F(a) provide the basis for the DMV's subject matter jurisdiction, and because those requirements are mandatory rather than directory and therefore must be strictly followed, respondents' failure to comply with mandatory notice requirements is grounds for dismissal and for the agency's order to be vacated. *See Trulove*, 54 N.C. App. at 222, 282 S.E.2d at 547.

Respondents argue that petitioner waived its argument regarding the statutory violation because petitioner "improperly raised questions concerning the Finding of Violation for the first time after the fact-finding administrative decision was entered and after . . . [p]etitioner was informed that no new evidence would be considered in the Commissioner's review." *See* N.C. Gen. Stat. § 20-183.8G(e)

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1. Subsection (a), which was titled "Finding of Violation," of N.C.G.S. § 20-183.8F has been repealed in its entirety by S.L. 2011-145, § 28.23B(a), eff. July 1, 2011. By repealing subsection (a) "Finding of Violation," the General Assembly did away with the mandatory provision which required an auditor to give notice that a violation had been found. Subsection (b), which has not been repealed and which is titled "Notice of Charges," states that, instead of requiring notice upon a *finding of a violation*, notice must be given when the Division *decides to charge* an inspection station: "When the Division decides to charge an inspection station, a self-inspector, or a mechanic with a violation that could result in the suspension or revocation of the person's license, the Division *must* deliver a written statement of the charges to the affected license holder." N.C.G.S. § 20-183.8F(b) (2013) (emphasis added). Thus, N.C. Gen. Stat. § 20-183.8F still maintains a mandatory notice provision. All that has changed is what triggers the mandatory notice provision. However, no time frame is provided in subsection (b) of the statute for how long DMV has to deliver a written statement of the notice of charges once it has determined that a violation occurred, but before deciding to charge the violation. *Compare id.* (mandatory notice provision triggered by *decision to charge*), *with* N.C.G.S. § 20-183.8F(a), repealed by 2011 N.C. Sess. Laws 2011-145, § 28.23B(a) (mandatory notice provision triggered by *finding of violation*).

(2014) ("The procedure set by the Division governs the review by the Commissioner of a decision made by a person designated by the Commissioner."); *id.* § 20-183.8G(f) ("Upon the Commissioner's review of a decision made after a hearing . . . on a Type I, II, or II violation by a license holder, the Commissioner must uphold any monetary penalty, license suspension, license revocation, or warning . . . if the decision is based on evidence presented at the hearing that supports the hearing officer's determination that the . . . license holder committed the act for which the monetary penalty, license suspension, license revocation, or warning was imposed."). However, subject matter jurisdiction cannot be waived and may be presented at any time. *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956).

Petitioner did not present any new evidence to respondent-DMV Commissioner, but merely raised a legal challenge to the finding and conclusion the DMV Hearing Officer made based on the evidence presented. Specifically, petitioner challenged the Official Hearing Decision and Order from 6 September 2012 which erroneously found that "[p]ursuant to N.C. Gen. Stat. § 20-183.8F, written notice of the complaint made was furnished to the licensee within the statutory timeline . . . ." All evidence relied upon by petitioner in making its legal argument regarding lack of subject matter jurisdiction was namely Inspector Ashley's testimony as to when the investigation was completed and the date of issuance of the Finding of Violation, all of which were included in the record before respondent-DMV Commissioner. These items were not new evidence as respondent-DMV claims.

The trial court erred in finding that petitioner's statutory violation argument was waived as petitioner properly raised this issue (1) in its original petition for judicial review and motion for stay, temporary restraining order, and preliminary injunction, (2) in its brief supporting its appeal from the Hearing Officer's order suspending petitioner's license, (3) before respondent-DMV Commissioner issued the final agency decision, and (4) before the trial court. Regardless, petitioner's argument was central to the issue of whether respondent-DMV had subject matter jurisdiction over the case and could have been raised at any time. Accordingly, we reverse the judgment of the trial court and remand with instructions to vacate the final agency decision of respondent-DMV.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

LANDOVER HOMEOWNERS ASS'N INC. v. SANDERS

[244 N.C. App. 429 (2015)]

LANDOVER HOMEOWNERS ASSOCIATION, INC., PLAINTIFF
v.
THOMAS B. SANDERS; ANNA B. SANDERS; SANDERS EQUIPMENT COMPANY, INC.; AND SANDERS DEVELOPMENT COMPANY, L.L.C., DEFENDANTS

No. COA14-1337

Filed 15 December 2015

1. Real Property—real estate development—transfer of rights—post-dissolution

Where a family involved in real estate development transferred property among several LLCs, the rights of one (Sanders Landover) were not validly assigned to defendants. The trial court erred by granting summary judgment for defendants in the homeowners association's action for unpaid assessments. A purportedly dissolved company may not assign its rights to another entity seven years after that assignor company's dissolution.

2. Estoppel—quasi-estoppel—transfer of subdivision declaration

In an action to collect unpaid homeowner's assessments where a family involved in real estate development transferred property among several LLCs and there were multiple subdivision declarations, supplemental declarations, and assignments, declarant's rights were not validly assigned to defendants and the declaration did not relieve defendants from their obligation to pay assessments. Quasi-estoppel barred defendants accepting the benefit of a 2006 second supplemental declaration while arguing that it was not bound by that declaration as to property it still owned.

3. Real Property—subdivision declaration—ambiguous language—summary judgment improper

The language in a second supplemental subdivision declaration was too ambiguous to support an order granting summary judgment in favor of defendants, even assuming that the declarant rights were validly assigned, because the language in the second supplemental declaration was too ambiguous to support summary judgment for defendants. The parties plainly disagreed about the scope of a provision in the second supplemental provision subdivision. Summary judgment should not be granted when an ambiguity exists because a provision in an agreement or a contract is unclear.

Appeal by plaintiff from order entered 1 July 2014 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 11 August 2015.

Harris & Hilton, P.A., by Nelson G. Harris, for plaintiff-appellant.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn, for defendant-appellees.

BRYANT, Judge.

Where ambiguities exist in the language of a declaration which create an issue of material fact, the trial court erred in granting summary judgment to defendants, and we reverse.

Defendants Thomas B. Sanders and Anna B. Sanders are husband and wife, who together own 95% of defendant Sanders Equipment Company, Inc. ("SEC"). The Sanders' two adult daughters, Deborah and Barbara, own the remaining 5%. The remaining defendant is Sanders Development Company, LLC ("SDC"), which was formed in 1997 for the purpose of buying property for development. Its sole members are Thomas, Deborah, and Barbara, with each owning a one-third membership interest.

Sanders Landover, LLC ("Sanders Landover") was formed on 12 April 2000. Like SDC, Sanders Landover was created and organized to buy, develop, and sell property, with Thomas Sanders and his two daughters each owning one-third of its membership interest. On 14 April 2000, two days after it was formed, Sanders Landover purchased a 56.63 acre tract of land in Wake County, paying approximately $700,000, which Sanders Landover had borrowed from SEC without any security. In early 2002, Sanders Landover recorded a plat for a portion of the 56.63 acre tract identified as "Landover Sections 1–3, 7–9."

Landover Homeowners Association, Inc. (alternatively, "HOA" or "plaintiff-Association") was formed on 10 May 2002 with the initial board consisting of Thomas, Deborah, and Barbara.[1] On 27 May 2002, Sanders Landover recorded a subdivision declaration in the Wake County Registry ("the 2002 declaration"). The 2002 declaration defines "Declarant" as

> Sanders Landover L.L.C., its successors and assigns, if such successors or assigns should acquire more than

1. Landover Homeowners Association, Inc. has since been turned over to the property owners within Landover Subdivision ("Q: So before it was transferred, who were the Directors of Landover Homeowners Association? A: I guess it would be the same; all of us that were in the – in the Landover, LLC.").

> one undeveloped Lot from the Declarant for the purpose of development or if such successors or assigns should acquire more than one Lot, whether developed or undeveloped, pursuant to foreclosure or a deed in lieu of foreclosure.

The 2002 declaration further subjected Sanders Landover's "Landover Sections 1–3, 7–9" to various covenants and conditions, including a requirement to pay annual and special assessments as levied by the HOA. Article VI, section 17 of the 2002 declaration stated, in pertinent part:

> During the Declarant Control Period, the Declarant shall pay annual and special assessments for all vacant Lots at an amount equal to one-half (1/2) of the applicable assessment. These assessments may be enforced against Declarant and collected by the [Homeowners] Association in the same manner as annual assessments applicable to other Owners.

Sanders Landover, as the original Declarant, was given wide latitude to assign its Declarant rights: "Declarant specifically reserves the right, in its sole discretion . . . [to] assign any or all of its rights, privileges and powers under this Subdivision Declaration or under any Supplemental Declarations."

Article I, section m of the 2002 declaration specifies that the "Declarant Control Period" will end no later than when the first one of three specified conditions occurs.[2] The only one of the three specified

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2. The three specified conditions are as follows:

> "Declarant Control Period is defined as the period of time beginning at the time of recording of this Declaration in the Registry and ending on the first to occur of the following:
>
> (i) the later of 5:00 p.m. on the date that is seven (7) years following the date of recordation of this Declaration in the Registry.
>
> (ii) the date on which the total number of votes entitled to be cast by the Class A Members and the Class B Members of the Association equal the total number of votes entitled to be cast by the Declarant, as the Class C Member of the Association (the total number of votes of either of the=three classes of membership in the Association may be increased or decreased by the annexation of Additional=Property or withdrawal of portions of the Property as provided herein); and in such instances Class C Membership may be reinstated.
>
> (iii) the date specified by the Declarant in a written notice to the Association.

conditions which has been met is the arrival of "5:00 p.m. on the date that is seven (7) years following the date of recordation" of the 2002 declaration. Thus, under the terms of the 2002 declaration recorded on 4 June 2002, the Declarant Control Period ended no later than 5:00 p.m. on 4 June 2009.

On 9 September 2002, Sanders Landover conveyed to SDC a 9.71-acre portion ("the townhome tract") of the original 56.63 acre tract. On 11 September 2003, a plat for the 9.71-acre townhome tract was recorded, and designated as "Landover Subdivision, Phases 4–6," thereby making it subject to the 2002 declaration containing covenants, conditions, and requirements imposed by the HOA. By 24 February 2004, all 9 sections or phases of Landover Subdivision were subject to the 2002 declaration. On 2 November 2005, SDC recorded a plat for the townhome tract showing 81 lots. On 5 December 2005, SDC conveyed Lots 1–16 of the townhome tract to Ross Construction ("Ross").

On 31 March 2006, Deborah signed and filed Articles of Dissolution for Sanders Landover, effective 31 December 2005.[3] Therefore, Sanders Landover is not a party to this action. On 13 June 2006, SDC conveyed 11 additional townhome lots to Ross, such that Ross owned 27 townhome lots and SDC owned the remaining 54 townhome lots.

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3. Nowhere in the record or briefs before this Court is there any indication of what happened to the remaining 46.92 acres owned by Sanders Landover after it sold the 9.71 acre townhome tract to SDC and prior to its dissolution on 31 December 2005. However, there is evidence that Sanders Landover, despite having been dissolved, was still listed as the title owner to some property:

> Plaintiff's Attorney: . . . [C]an you tell me why Sanders Landover, LLC was dissolved effective December 31st, 2005?
>
> Thomas B. Sanders: Well, we were through with that particular section.
>
> Plaintiff's Attorney: Did Sanders Landover, LLC have title to any of the property that you're aware of?
>
> Thomas B. Sanders: You mean after that time?
>
> Plaintiff's Attorney: As of December 31st of 2005?
>
> Thomas B. Sanders: I don't – I think all land – all – the lots had been sold. Everything had been sold and transferred to other people.
>
> . . .
>
> Plaintiff's Attorney: Well, would it surprise you to learn that Sanders Landover, LLC continued to have title to property after December the 31st of 2005?
>
> Thomas B. Sanders: I don't know where it would be.

On 25 July 2006, a second supplemental declaration ("the 2006 second supplemental declaration") for the subdivision was recorded, purportedly by Sanders Landover, plaintiff-association, and Ross. The 2006 second supplemental declaration recited, *inter alia*, that Sanders Landover owned certain lots subject to the declaration. This was incorrect on two accounts. First, as noted *supra*, Sanders Landover had conveyed the entire 9.71-acre townhome tract to SDC on 9 September 2002 (which in turn had conveyed some of the lots to Ross). Second, Sanders Landover had been dissolved since 31 December 2005. The 2006 second supplemental declaration also amended Article VI, section 17 of the 2002 declaration to read as follows: "Declarant has no obligation for payment of Annual and Special Assessments. During the Declarant Control Period, the Declarant shall not pay any annual or special assessments for vacant recorded Lots."

On 6 September 2011, SDC conveyed Lots 75–81 to SEC. On 6 March 2012, SEC conveyed the same lots to Thomas and Anna Sanders. On the same date, SDC conveyed lots 64–66 and 71–74 of the townhomes to the Sanders. Thus, on 6 March 2012, the Sanders purported to own townhome lots 64–66 and 71–81 ("the Sanders lots"). On 27 December 2012, almost seven years after its dissolution, Sanders Landover recorded an "Assignment of Declarant Rights" purporting to assign its rights under the 2002 declaration and the supplemental declarations to SDC, retroactive to 20 January 2007. On the same date, SDC recorded a second "Assignment of Declarant Rights" which purported to assign SDC's rights to Thomas and Anna Sanders. On 9 May 2013, the Sanders conveyed the Sanders lots (lots 64–66 and 71–81) to SEC, without consideration. On 26 July 2013, the Sanders recorded a third "Assignment of Declarant Rights"[4] which purported to assign their rights to SEC.

> Plaintiff's Attorney: Okay. All right. Well, were you aware that it had title to – well, were you aware that to this day it still has title to the common areas?
>
> Thomas B. Sanders: No, I have no idea.
>
> Plaintiff's Attorney: And were you aware that it did have title to some of the lots in the original development as of December the 31st of 2005?
>
> Thomas B. Sanders: I didn't – at the times we dissolved it, I thought we were – had transferred all the properties.

4. The "first" Assignment of Declarant Rights was made by Sanders Landover to assignee-SDC on 20 January 2007, however it was not recorded in the Office of the Register of Deeds of Wake County as required by statute. The "second" Assignment of Declarant Rights was made by Sanders Landover to assignee-SDC and recorded on 27 December 2012, with an effective date of 20 January 2007.

Plaintiff, Landers Homeowners Association, imposed annual assessments from 2009–2012 and four quarterly assessments in 2013. None of these assessments were paid by the owners of the Sanders lots—SEC—who had acquired them from the Sanders for no consideration. On 16 September 2013, plaintiff filed a complaint seeking payment of the unpaid assessments with interest, as well as costs and attorneys' fees. Plaintiff sought to pierce the corporate veil as regards SDC and SEC for failure to observe corporate formalities. Both sides moved for summary judgment.

Defendants asserted various defenses, including estoppel, statute of limitations, and that the language of the second supplemental declaration—"Declarant has no obligation for payment of Annual and Special Assessments. During the Declarant Control Period, the Declarant shall not pay any annual or special assessments for vacant recorded Lots"—made clear that the owners of the Sanders lots (during the pertinent years, SDC, the Sanders, and SEC) as Declarants, had no obligation to pay any assessments. On 1 July 2014, the trial court granted summary judgment in favor of all defendants. Plaintiff appealed.

On appeal, plaintiff argues that the trial court erred in denying its motion for summary judgment and granting defendants' motion for summary judgment. Specifically, plaintiff argues that (I) the various defendants who owned the Sanders lots during 2009–2013 were not "Declarants" and (II) even if defendants were "Declarants," the language of the 2006 second supplemental declaration is clear in not exempting them from paying assessments, or, in the alternative, is ambiguous in its requirements such that a genuine issue of material fact remains and summary judgment was improper. We agree.

I

[1] Plaintiff argues that Sanders Landover's rights under the declaration were not assigned to defendants. Specifically, plaintiff argues that defendants should not be considered "declarants," as that term is defined in Article 1(1) of the Declaration (the 2002 declaration), for purposes of determining their liability for assessments.

Plaintiff contends that Sanders Landover cannot assign its rights as a declarant with an effective date over a year after Sanders Landover was dissolved, by instrument which was not reduced to writing and recorded for another seven and a half years. Despite the fact that plaintiff offers no authority or case law to otherwise support its proposition

that a purportedly dissolved company may not assign its rights to another entity seven years after that assignor company's dissolution, we agree that declarant Sanders Landover's rights were not validly assigned to defendants. In the First Assignment, by which Sanders Landover as declarant purportedly assigned its rights to SDC, this assignment was only recorded on 27 December 2012, almost seven years after Sanders Landover's dissolution.

> A dissolved corporation continues its corporate existence *but may not carry on any business except that appropriate to wind up and liquidate its business and affairs*, including:
>
> (1) Collecting its assets;
>
> (2) Disposing of its properties that will not be distributed in kind to its shareholders;
>
> (3) Discharging or making provision for discharging its liabilities;
>
> (4) Distributing its remaining property among its shareholders according to their interests; and
>
> (5) Doing every other act necessary to wind up and liquidate its business and affairs.

N.C. Gen. Stat. § 55-14-05(a) (2013) (emphasis added). There is nothing in the record to indicate that Sanders Landover's purported assignment of Declarant rights was related to any winding up of the corporation, nor does the law support such an assignment following a company's dissolution. *See S. Mecklenburg Painting Contractors, Inc. v. Cunnane Grp., Inc.*, 134 N.C. App. 307, 314–15, 517 S.E.2d 167, 170–71 (1999) (holding that where a corporation was dissolved on 9 March 1993, there remained no legal basis upon which to validate an alleged contract made with another party on 22 May 1997 so as to permit suit upon the alleged contract); *Piedmont & W. Inv. Corp. v. Carnes-Miller Gear Co., Inc.*, 96 N.C. App. 105, 107–08, 384 S.E.2d 687, 688 (1989) ("At the time of the attempted conveyance the plaintiff corporation was dissolved and had no legal existence. . . . Because the plaintiff corporation had no legal existence on the date of the conveyance the deed could not operate to convey title to plaintiff.").

Furthermore, while the First Assignment recites that it was retroactive to 20 January 2007, that retroactive application date is well after both the 31 December 2005 effective date of Sanders Landover's dissolution

and the 31 March 2006 recording date of the Articles of Dissolution. Accordingly, Sanders Landover's declarant rights were never effectively assigned to defendant SDC and to the extent that the trial court granted summary judgment in favor of defendants because it considered defendants to be entitled to declarant status, it erred.

II

[2] Plaintiff next argues that the 2006 second supplemental declaration subjects the Landover Townhome Property to the declaration and that plaintiff is owed assessments imposed and owing, during the relevant periods. Because we agree with plaintiff that declarant's rights under the declaration were not validly assigned to defendants, the declaration accordingly does not relieve defendants from their obligations to pay assessments, as stated above. However, defendants argue that since SDC, the owner of the Landover Townhome Property, did not sign the 2006 second supplemental declaration, rather Sanders Landover did, the Landover Townhome Property was not made subject to the Declaration and, therefore, no assessments are owing by defendants to plaintiff.

Plaintiff, on the other hand, contends that the use of "Sanders Landover" instead of "Sanders Development" in the 2006 second supplemental declaration was simply sloppy draftsmanship caused by the closeness of the Sanders' entities names and that, furthermore, the error was not caught because the same individuals who would have signed the 2006 second supplemental declaration for "Sanders Development, LLC" were the ones who signed on behalf of "Sanders Landover, L.L.C."[5] It would appear, then, that the intent of the 2006 second supplemental declaration was for *Sanders Development Company*—not Sanders Landover—along with plaintiff and Ross to subject the Landover Townhome Property to the declaration.

Defendants' contention that the 2006 second supplemental declaration is not binding because Sanders Landover signed it and SDC did not own any of the property being subjected to the declaration is barred by the equitable doctrine of quasi-estoppel.

> The essential purpose of quasi-estoppel is to prevent a party from benefitting by taking two clearly inconsistent

5. SDC, formed in 1997, was owned by Thomas Sanders and his two daughters, Deborah and Barbara, each owning a one-third membership interest. Sanders Landover, which was formed in 2000, was identically owned by Thomas Sanders and his two daughters, Deborah and Barbara, each owning a one-third membership interest.

> positions . . . . [Q]uasi-estoppel is directly grounded . . . upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts.

Smith v. DenRoss Contracting, U.S., Inc., 224 N.C. App. 479, 487, 737 S.E.2d 392, 398 (2012) (quotation marks and citations omitted).

Here, SDC accepted the benefit of the 2006 second supplemental declaration by thereafter making conveyances of lots that it owned subject to its terms. On 12 January 2007, SDC conveyed "Lots 20, 21, 22, 31, 32, 34, 35, 36, 40, 41 and 42 Landover Town Homes as recorded on those plats entitled 'Landover Town Homes, Owners, Sanders Development Company' " to Ross Construction. The deed specifically provided that the conveyance was subject to "[r]estrictive covenants recorded in Book 12079, Page 434 and Book 9443, Page 484, Wake County Registry." The restrictive covenants recorded in Book 12079, Page 434 comprise the 2006 second supplemental declaration.

Thus, SDC made conveyances of property reciting that the property conveyed was subject to the 2006 second supplemental declaration, and defendants are barred by quasi-estoppel from asserting otherwise. Defendants cannot now argue that, while Ross is bound by the 2006 second supplemental declaration following SDC's conveyance of property to Ross, which was subject to the 2006 second supplemental declaration, SDC is somehow not likewise bound by the 2006 second supplemental declaration with regards to property it still owns.

[3] Even assuming arguendo that the former Sanders Landover principals could have validly assigned Sanders Landover's rights as a Declarant to defendants after its dissolution effective 31 December 2005, the language in the 2006 second supplemental declaration is too ambiguous to support an order granting summary judgment in favor of defendants. The language in the second supplemental declaration states as follows: "Declarant has no obligation for payment of Annual and Special Assessments. During the Declarant Control Period, the Declarant shall not pay any annual or special assessments for vacant recorded Lots."

When an ambiguity exists because a provision of an agreement or contract is unclear, it creates an issue of material fact, and summary judgment should not be granted. *See Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 267, 554 S.E.2d 863, 867 (2001) (holding the trial court erred in granting summary judgment where ambiguity existed with respect to a plaintiff's hunting rights because it was unclear from the

agreement as to how to apply the words of the hunting rights provision); *see also Schenkel & Schultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 274–75, 658 S.E.2d 918, 922–23 (2008) (holding that where the language of a subprime agreement was "susceptible to differing yet reasonable interpretations, one broad, the other narrow, the contract is ambiguous and summary judgment was inappropriate" and remanding to the superior court in order to resolve the ambiguity). "An ambiguity exists in a contract if the 'language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Crider*, 147 N.C. App. at 267, 554 S.E.2d at 866–67 (quoting *Barrett Kays & Assocs., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998)).

Here, the parties plainly disagree regarding the meaning of the provision of the 2006 second supplemental declaration at issue. The ambiguity here arises from the intended scope of the 2006 second supplemental declaration. Plaintiff argues that, reading the Declaration as a whole, it is clear that, at the time the Declarant Sanders Landover recorded the Declaration in 2002, the intent was that all lot owners would be liable for assessments with respect to the lots that they owned, except that Declarant would only be liable for one-half the amount of the assessments during the Declarant Control Period. As the Declarant Control Period is now over—it began on 4 June 2002, the day the 2002 Declaration was recorded and ended no later than seven years later on 4 June 2009—plaintiff contends that the Declaration does not completely relieve Declarant from its obligation to pay assessments; it simply provides that Declarant loses the right granted under Article VI, Section 17 of the Declaration to pay only one-half of the regular assessments.

Defendants would have us read the disputed language in the second supplemental declaration as cumulative—that declarant owed no annual or special assessments during the Declarant Control Period, nor does it owe any annual or special assessments following the end of the Declarant Control Period. Again, plaintiff would have us read the second sentence as modifying the first and read the language as indicating no intent to change Declarant's obligations to pay assessments accruing after the Declarant Control Period. Because the language in the second supplemental declaration "is fairly and reasonably susceptible to either of the constructions by the parties," the language is sufficiently ambiguous to create an issue of material fact, and the trial court erred in granting summary judgment in favor of defendants. *See Crider*, 147 N.C. App. at 267, 554 S.E.2d at 866–67.

Accordingly, to the extent the trial court granted summary judgment in favor of defendants because it considered defendants to be entitled to "declarant" status, and believed the Landover Townhome Property was not subject to the 2006 second supplemental declaration, we disagree and reverse the trial court's grant of summary judgment. Likewise, to the extent the trial court granted summary judgment because it found no issue of material fact based on a lack of ambiguity, we reverse. Accordingly, we remand this matter for further proceedings.

REVERSED AND REMANDED.

Judges STEPHENS and DIETZ concur.

SOUTHEASTERN SURETIES GROUP, INC., PLAINTIFF
v.
INTERNATIONAL FIDELITY INSURANCE COMPANY AND RICHARD L. LOWRY, DEFENDANTS

No. COA14-815

Filed 15 December 2015

Parties—real party in interest—bail bondsman and sureties—stay of proceeding

In an action arising from a bail bond where the person released failed to appear and was never found, there were multiple proceedings between sureties arising from the bond forfeiture; numerous civil suits in two states, including North Carolina; and eventually a federal case involving indemnity. The North Carolina court granted a stay until completion of the federal action. Because the federal action was filed first and all of the parties are currently litigating the ultimate issue in this case (who should be liable for the loss), the trial court's issuance of a stay was not an abuse of discretion. The majority conclusion added that a finding and conclusion were made in error and should be stricken from the stay order. The opinion concurring in the result would not have stricken the finding and conclusion. The third opinion, the concurrence and dissent, would have held that the North Carolina court should not have stayed the proceedings until the real party in interest issue was resolved.

Judge BRYANT concurring in the result.

Judge HUNTER, Jr. concurring in part and dissenting in part.

Appeal by plaintiff from order entered 3 March 2014 by Judge Marvin P. Pope, Jr. in Superior Court, Henderson County. Heard in the Court of Appeals 6 January 2015.

McGuire, Wood & Bissette, P.A., by Joseph P. McGuire and Starling B. Underwood III, for plaintiff-appellant.

Ellis & Winters LLP, by Matthew W. Sawchak, Leslie C. Packer, and Nora F. Sullivan for defendant-appellee International Fidelity Insurance Company

STROUD, Judge.

Plaintiff Southeastern Sureties Group, Inc., appeals trial court order granting defendant International Fidelity Insurance Company's motion to stay. For the following reasons, we affirm.

I. Background

This case has a lengthy and complex history, beginning with Elder Cortez, who was granted pretrial release on charges for several felonies upon posting a bond of $600,000.00. *State v. Cortez*, ___ N.C. App. ___, ___, 747 S.E.2d 346, 349 (2013). Mr. Cortez failed to appear for court and has never been found, *see International Fidelity Insurance Co. v. Apodaca*, ___ F. Supp. 2d ___, (D. N.J. 2015) (Civ. No. 13-06077), leading to proceedings arising from the bond forfeiture and eventually metastasizing into numerous civil actions in two states including many individual and corporate parties and three prior appeals to this Court. *See id.*; *Cortez*, ___ N.C. App.at ___, 747 S.E.2d at 349-54. Some background of this case is required for an understanding of the issues presented in this appeal. Some of this information comes from pleadings and documents that may not directly involve the current two parties in this appeal. We will first summarize the background including some "facts" or allegations that may not have been established before us on this appeal. We are not relying on any contested facts or mere allegations in our legal analysis but include them here to the extent needed to understand the case currently before us.

A. Creation of Southeastern and its Relationship with International

In 1984, Mr. Thomas Apodaca became a licensed bail bondsman. In 1987, defendant International Fidelity Insurance Company

("International") entered into a contractual relationship with Mr. Apodaca which made him a bond producer for defendant International in North Carolina ("1987 Contract"). According to defendant International, through the contractual relationship, Mr. Apodaca wrote bonds on behalf of International and dealt with the financial aspects of the bonds along with ensuring that bonded individuals appeared in court. Mr. Apodaca was responsible for any sub-producers who aided him, while defendant International was responsible as the surety of the bonds Mr. Apodaca executed on its behalf, and Mr. Apodaca was to indemnify defendant International for any losses sustained. Although this 1987 Contract is central to many of the arguments in this case, unfortunately it is not part of our record on appeal.

In 1995, plaintiff Southeastern Sureties Group, Inc. ("Southeastern") was incorporated and Mr. Apodaca became its president. According to Mr. Apodaca, Southeastern was the general agent for defendant International; how or when this agency relationship arose is unclear as the only relevant contract we are aware of was the 1987 Contract between Mr. Apodaca and defendant International, approximately eight years before plaintiff Southeastern was incorporated. Nonetheless, Mr. Apodaca claims that plaintiff Southeastern had a sub-agent executing bonds on behalf of defendant International, Mr. Richard Lowry.

In 2004, Mr. Apodaca and defendant International entered into another contract ("2004 Contract"). Plaintiff Southeastern, which had been incorporated at this point, is not mentioned in the 2004 Contract. The 2004 Contract states it is between Mr. Apodaca and defendant International, and Mr. Apodaca signed the 2004 Contract only on his own behalf. The 2004 Contract sets out various terms governing the relationship between Mr. Apodaca and defendant International including an "APPLICABLE LAW" provision as follows:

> In event of dispute or litigation, exclusive jurisdiction and venue shall lie in the State of New Jersey. The parties hereby agree that any legal action brought to enforce any of the rights of the parties under this agreement or arising out of the disputes between them shall be brought only in the State or Federal courts of New Jersey.

B. The Cortez Bond Forfeiture

Since the bond forfeiture from which this case arises has been addressed in three prior appeals to this Court, we will use the background from one of the prior cases and emphasize portions relating to any individual or entity as relevant to issues raised in this appeal:

Twenty-nine-year-old Elder Giovani Cortez ("defendant") was arrested and indicted for the offenses of first-degree kidnapping, first-degree rape of a child under the age of thirteen, and taking indecent liberties with a child, which offenses were alleged to have occurred on 23 August 2007. Defendant was authorized to be released upon the execution of a secured bond in the amount of $2,000,000.00, which was later reduced to $600,000.00. On 16 September 2008, four months after defendant's secured bond was reduced, defendant was released on bail subject to the conditions of appearance bonds executed by Tony L. Barnes, Larry D. Atkinson, and *Richard L. Lowry* in the amounts of $20,000.00, $10,000.00, and *$570,000.00*, respectively.

Mr. Barnes executed the $20,000.00 bond as an accommodation bondsman, and Mr. Atkinson executed the $10,000.00 bond as a professional bondsman, which rendered each a surety on their respective bonds. Because *Mr. Lowry executed the $570,000.00 bond as a "bail agent," the surety for that bond was the insurance company on behalf of which Mr. Lowry executed the bond.* The record shows that, at the time the bond was executed, *Mr. Lowry was authorized to execute bail bonds both for International Fidelity Insurance Company ("International")* and for Accredited Insurance Company ("Accredited"). The insurance company named on the face of the appearance bond executed by Mr. Lowry was Accredited, while *International was the insurance company named on the attached power of attorney that evidenced Mr. Lowry's authority to execute criminal bail bonds of up to $1 million.* According to an affidavit from International's Senior Vice President Jerry W. Watson, International is not an affiliate, subsidiary, or parent of Accredited, and Accredited is, in fact, a competitor of International. *Only International received and accepted the $3,990.00 premium paid for the execution of the $570,000.00 bond.*

In order to secure the $570,000.00 appearance bond executed by Mr. Lowry, defendant and his wife Raquel H. Cortez executed a promissory note in the amount of $600,000.00, made payable to L R & M Corp, Richard

Lowry, upon the condition that, if defendant fails to appear for any scheduled or unscheduled court date in 07 CRS 56935 in the County of Johnston, State of North Carolina and a forfeiture issued, this note shall be due on demand. Two deeds of trust, each representing a total indebtedness of $300,000.00 and naming L R & M Corp and Mr. Lowry as beneficiaries, were provided as collateral to secure the $600,000.00 promissory note.

On 18 February 2009, defendant failed to appear in court, and *the Johnston County Clerk of Superior Court's Office ("Clerk's Office") issued bond forfeiture notices to Mr. Barnes, Mr. Atkinson, and International, as the sureties of record, and to Mr. Lowry, as the bail agent for named surety International.* Each notice, which was sent using the Administrative Office of the Courts' Form AOC–CR–213, indicated that the forfeiture of the bond for each surety named on the notice would become a final judgment on 23 July 2009, unless that forfeiture was set aside upon a party's motion prior to that date, or unless such motion was still pending on that date. The notices further provided that a forfeiture will not be set aside for any reason other than those enumerated on the form.

On 22 July 2009, one day before the forfeitures were set to become final judgments, Mr. Atkinson and Mr. Barnes as sureties, and *Mr. Lowry as the bail agent for named surety International, each indicated their intent to move to set aside the forfeitures by signing and dating the Motion To Set Aside Forfeiture* section on the second page of the bond forfeiture notice forms they had received from the Clerk's Office almost five months earlier. Although Form AOC–CR–213 allows the movant to mark the checkbox next to the enumerated reason that supports their request to set aside a forfeiture, Mr. Atkinson, Mr. Barnes, and Mr. Lowry (collectively "the Bondsmen") did not indicate by checkmark which of the reasons supported their motions to set aside, and instead wrote See attached Petition at the top of their respective notice forms. Then, *the Bondsmen and International filed a Motion for Remission of Forfeiture ("the Remission/Set Aside Motion") with the Clerk's Office, in which they collectively sought to set forth the contended ground for relief from the order of forfeiture.*

In this Remission/Set Aside Motion, the movants alleged that they each signed as surety for the appearance of the defendant in this matter. They further alleged that, although defendant had been located in Mexico and a federal arrest warrant had been issued for service by the FBI and by the Mexican Federal Police, defendant had not yet been served with any arrest warrant but would be shortly. In support of their allegations, the movants then attached to the motion approximately 160 pages of e-mails chronicling Mr. Lowry's efforts to locate defendant between February 2009 and July 2009. In addition to attaching a copy of the motion to the Form AOC–CR–213 they each filed with the Clerk's Office, copies of the Remission/Set Aside Motion were also served on the Johnston County District Attorney's Office ("the DA's Office") and on the attorney for the Johnston County School Board ("the Board").

Neither the DA's Office nor the Board filed objections to the 22 July 2009 motions seeking to set aside the forfeitures. Consequently, on 3 August 2009, the Johnston County Clerk of Superior Court ("the Clerk") granted the movants' requests to set aside the forfeitures. On 7 August 2009, Mr. Lowry then executed a satisfaction of the deeds of trust that had been provided by defendant and his wife as collateral to secure the promissory note that secured the appearance bonds. On 25 August 2009, the Board filed a motion against defendant and the Bondsmen pursuant to N.C.G.S. § 1A–1, Rule 60 ("the Rule 60 Motion"), in which the Board requested that the court strike the 3 August 2009 order that set aside the forfeitures. *Although International was not named in the motion's caption, International was served with a copy of the Board's Rule 60 Motion, which specifically alleged that International posted a bond in the amount of $570,000.00 for the release of defendant.*

In its Rule 60 Motion, the Board challenged whether the form of the movants' requests to set aside the forfeitures sufficiently complied with the procedures set forth in N.C.G.S. § 15A–544.5. Specifically, the Board asserted that the 3 August 2009 order setting aside the forfeitures should be stricken because: the movants did not indicate

by checkmark on the second side of Form AOC–CR–213 which of the enumerated reasons supported their motions to set aside, and such a failure, the Board argued, was in dereliction of the requirements set forth in N.C.G.S. § 15A–544.5(b); the movants' Remission/Set Aside Motion was filed in contravention to the direction of a 12 January 2009 Administrative Order by the chief district and senior resident superior court judges for Judicial District 11–B that all motions to set aside a forfeiture made pursuant to N.C.G.S. § 15A–544.5 must be filed on Form AOC–CR–213; the documents accompanying the movants' Remission/Set Aside Motion were not sufficient evidence to support any of the grounds for which a forfeiture shall be set aside pursuant to N.C.G.S. § 15A–544.5(b); and the movants' Remission/Set Aside Motion was not captioned as a Motion to Set Aside Forfeiture, but rather as a Motion for Remission of Forfeiture, which the Board alleged caused it to believe that no objection was required to contest said motion pursuant to N.C.G.S. § 15A–544.5(d). In response to this motion, the Bondsmen urged the court to conclude that the Board's failure to object to the Remission/Set Aside Motion pursuant to N.C.G.S. § 15A–544.5(d) caused the forfeitures to be set aside by operation of law.

On 12 October 2009, the trial court entered an order denying the Board's motion to vacate or strike the 3 August 2009 order that set aside the forfeitures. The trial court concluded that, notwithstanding the misleading caption on sureties' motion, the tenuous claim of the sureties under N.C.G.S. § 15A–544.5(b)(4)—which provides that a forfeiture shall be set aside when the defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidence by a copy of an official court record, N.C. Gen. Stat. § 15A–544.5(b)(4) (2011)—and the sureties' loose compliance with this court's administrative order governing bond forfeitures, the Board and the DA's Office had actual notice of the nature of the relief sought by the sureties, failed to object within the then-ten-day period for doing so, and the Board made no showing that it was entitled to relief under Rule 60(b)(1), (b)(4), or (b)(6). The Board appealed to this Court from the trial court's 12 October 2009 denial of its Rule 60 Motion; the Board

did not appeal from the 3 August 2009 order setting aside the bond forfeitures.

On 19 April 2011, this Court reversed and remanded the trial court's denial of the Board's Rule 60 Motion seeking to strike the 3 August 2009 order. *See Cortez I*, 211 N.C. App. 198, 711 S.E.2d 876, slip op. at 14. In *Cortez I*, this Court determined that the Clerk was without authority to grant the motion because the movants' claimed reasons for relief from forfeiture did not come within the purview of the statute and the requisite documentation was entirely absent. Consequently, this Court concluded that the 3 August 2009 order, which set aside the forfeitures, was void, and remanded the matter with instructions for the trial court to either dismiss Sureties' Remission/Set Aside Motion or deny the same for the reasons set forth herein.

However, before this Court filed its decision in *Cortez I*, defendant's case was placed on another court calendar and, again, defendant failed to appear. Then, on 17 November 2009, two weeks after defendant failed to appear for the second time, and one week after the Board gave its notice of appeal to this Court from the denial of its Rule 60 Motion that was at issue in *Cortez I*, the Clerk's Office issued another round of bond forfeiture notices to Mr. Barnes, Mr. Atkinson, *and International, as sureties, and to Mr. Lowry as bail agent for named surety International*. However, the sureties had not rebonded defendant following his initial 18 February 2009 failure to appear; instead, this second round of forfeiture notices were issued only for the original bonds executed by the sureties. *See Cortez II*, 215 N.C. App. at ___, 715 S.E.2d at 882. Thus, in response to these second forfeiture notices, in April 2010, *the Bondsmen filed their Motion to Dismiss and Motion to Set Aside Forfeiture, in which they asserted that the 17 November 2009 notices of forfeiture should be stricken, vacated and set aside, and dismissed, because the trial court was divested of its jurisdiction to issue notices of forfeiture once the Board gave notice of appeal from the trial court's denial of the Board's Rule 60 Motion*. After hearing the matter, on 17 May 2010, the trial court entered an order denying the

Bondsmen's April 2010 motions. The Bondsmen appealed to this Court from this order.

On 20 September 2011, in *Cortez II*, this Court concluded, were we to hold that the Clerk and the court had jurisdiction to enter and affirm the second orders of forfeiture, the sureties would currently be liable for two separate failures to appear and, therefore, liable for two times the actual amount of the bonds executed in defendant's case. Thus, after determining that the 10 November 2009 appeal divested the Clerk and the trial court of jurisdiction to take further action relating to the 16 September 2008 bonds so long as issues surrounding those bonds remained subject to appellate review, this Court vacated the trial court's second orders of forfeiture.

The Board then filed a motion in the trial court requesting that the court comply with this Court's decision in *Cortez I*—which held that the 3 August 2009 order setting aside the forfeitures was void—by either dismissing or denying the movants' 22 July 2009 Remission/Set Aside Motion. After hearing the matter, on 5 January 2012, the trial court entered an order ("the 5 January 2012 Order") in which it did the following: vacated its own 12 October 2009 order that denied the Board's Rule 60 Motion to strike the 3 August 2009 order setting aside the forfeitures; dismissed the movants' 22 July 2009 Remission/Set Aside Motion for the reasons set forth in the *Cortez I* decision; and ordered that the forfeitures shall become final judgments. *The Clerk's Office then entered an electronic bond forfeiture judgment pursuant to the trial court's order, and issued a writ of execution to the Sheriff of Johnston County ("the Sheriff") giving notice that International must pay $570,000.00 plus interest and fees.*

On 4 January 2012, one day before the trial court entered its order declaring that the forfeitures were final judgments, *the Bondsmen and International together filed a complaint ("the Bondsmen Complaint") designated as File No. 12 CVS 30 against defendant, the State of North Carolina ("the State"), the Board, the Clerk, and the Sheriff.* In the Bondsmen Complaint, plaintiffs requested that the trial court should declare that the Clerk did in fact terminate the Plaintiffs' contractual obligation

on the bonds when it entered its 3 August 2009 order setting aside the forfeitures, and that, as a consequence, plaintiffs may not be held liable on the bonds, or, in the alternative, that, even if the Clerk's 3 August 2009 Orders did not terminate the contractual obligation, the State and the Board are estopped from seeking to impose any kind of contractual liability upon the Plaintiffs relating to the bonds to the extent that the bonds were formerly secured by the deeds of trust (which deeds of trust were required to be cancelled). The Bondsmen also sought injunctive relief pursuant to 42 U.S.C. § 1983.

The day after the trial court entered its 5 January 2012 Order declaring that the forfeitures were final judgments, International returned the premium it received for defendant's bond. Then, one week later, International voluntarily dismissed its claims in the Bondsmen Complaint without prejudice pursuant to N.C.G.S. § 1A–1, Rule 41(a), and filed a separate complaint ("the International Complaint") designated as File No. 12 CVS 201 against the same defendants. In the International Complaint, International requested that the trial court declare that no forfeiture or judgment can be held against International in the matter of the bonds executed to secure the appearance of defendant, because Accredited had been the insurance company named on the face of the appearance bond, and because Mr. Lowry had no authority to attach International's Power of Attorney to an Accredited bond. International further requested that the court declare that it was not a party to the 5 January 2012 Order, because neither the Board's Rule 60 Motion nor the 5 January 2012 Order named International as a party in the caption.

The Board then filed motions to dismiss the Bondsmen and International Complaints pursuant to Rule 12(b)(1) and (b)(6), and on the grounds that the complaints are impermissible collateral attacks on the trial court's 5 January 2012 Order and are further barred by the doctrines of res judicata, collateral estoppel, and equitable estoppel. The State, with the Clerk, filed motions to dismiss both complaints on similar grounds. The trial court conducted hearings on the

motions to dismiss in both actions. On 11 April 2012, the trial court entered an order in File No. 12 CVS 30 allowing the Board's motion to dismiss the claims alleged in the Bondsmen Complaint as they relate to a declaratory judgment and to the substantive law of contracts involving the original contract or appearance bond between the plaintiffs and the State, on the grounds that such claims constituted a collateral attack on the 5 January 2012 Order that made the forfeitures final judgments—from which the parties had not appealed—and on the grounds that such claims were barred by the doctrines of res judicata and collateral estoppel. However, the motion to dismiss the claim in the Bondsmen Complaint that sought injunctive relief for alleged violations of 42 U.S.C. § 1983 by the State was denied without prejudice. On the same day, *the trial court also entered an order in File No. 12 CVS 201, in which it dismissed the claims that had been alleged in the International Complaint against the Board, the State, and the Clerk, on the grounds that such claims constituted a collateral attack on the 5 January 2012 Order that made the forfeitures final judgments, and on the grounds that such claims were barred by the doctrines of res judicata and collateral estoppel. International appealed to this Court from the trial court's order allowing the motions to dismiss the International Complaint*, and the Bondsmen and L R & M Bailbonds, Inc. appealed from the order allowing the Board's motion to dismiss the first cause of action in the Bondmen Complaint. The trial court certified the appealability of its order regarding the Bondsmen Complaint pursuant to N.C.G.S. § 1A–1, Rule 54(b).

Then, on 17 July 2012, *the Board moved for monetary sanctions pursuant to N.C.G.S. § 15A–544.5(d)(8) against defendant, International, and the Bondsmen in File No. 07 CRS 56935—the underlying criminal case for which the original appearance bonds had been made—on the grounds that the 22 July 2009 Remission/Set Aside Motion was plainly frivolous and filed for the sole purpose of preventing the forfeitures from going into judgment.* The Board requested that the court impose monetary sanctions in the amount of fifty percent of each bond against Mr. Barnes and Mr. Atkinson individually,

> and against Mr. Lowry and International together. On 24 August 2012, *the court ordered that, because Mr. Atkinson and Mr. Barnes promptly paid their respective bonds after the 5 January 2012 Order, and because Mr. Lowry is not a surety for the $570,000.00 bond, only International shall pay a sanction in the amount of $285,000 pursuant to N.C.G.S. § 15A–544.5(d)(8). International gave timely notice of appeal from this order.* The court then stayed the execution on the civil judgment for monetary sanctions pursuant to the pending appeal; the stay was secured by a bond.

Cortez, ___ N.C. App. at ___, 747 S.E.2d at 349-54 ("*Cortez III*") (emphasis added) (citations, quotation marks, ellipses, brackets, and footnotes omitted). Ultimately, in *Cortez III*, this Court affirmed all of the trial court's orders appealed in *Cortez III*; thus, defendant International owed $570,000.00 plus interest and fees for the bond forfeiture and $285,000.00 in sanctions. *See id.* at ___, 747 S.E.2d at 354.

C. The Federal New Jersey Case Before This Appeal

In October of 2013, defendant International filed a complaint against Mr. Apodaca and Lisa Tate Apodaca, Mr. Apodaca's wife, in federal court in New Jersey for breach of contract claiming that pursuant to the 1987 Contract, Mr. Apodaca was required to indemnify defendant International for the money it was being ordered to pay in North Carolina for the Cortez bond forfeiture.[1]

D. The North Carolina Case

On 1 November 2013, plaintiff Southeastern filed a complaint against defendants International and Mr. Lowry in North Carolina seeking a declaratory judgment which would, in effect, protect plaintiff Southeastern from any claim for indemnification for the Cortez bond. According to the allegations in the complaint, plaintiff Southeastern was defendant International's "general agent . . . and was authorized to execute bail bonds for" defendant International. Plaintiff Southeastern requested:

> (A) That the Court declare that International was not a surety on the Bond;

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1. As further discussed below, Mrs. Apodaca was later removed as a party to the New Jersey case and plaintiff Southeastern was added as a defendant.

(B) That the Court declare that International's return and/or refund of premium on the Bond released Southeastern from any obligation arising out of the Bond and waived any claim against Southeastern relating to the Bond;

(C) That the Court declare that the actions and omissions of International and Mr. Lowry resulting in the release of the collateral securing the Bond, the imposition of sanctions of $285,000 by the court, the Forfeiture becoming final and a loss on the Bond that was unnecessary and avoidable released and discharged Southeastern from any obligation under the Bond;

(D) That the Court declare that International's breach of duty and negligence in connection with the Bond precludes any recovery against Southeastern relating to the Bond;

(E) That Southeastern have and recover judgment against International in an amount in excess of $15,000, plus interest thereon at 8% per annum;

(F) That International be estopped from claiming that it was the insurance company on the Bond and/or that the Bond is enforceable;

(G) That Southeastern have a trial by jury;

(H) That the costs of this action be taxed to International and Mr. Lowry; and

(I) That Southeastern have such further relief as the Court may deem just and proper.

On or about 21 November 2013, defendant International amended its complaint pending in the federal court in New Jersey, removing Mrs. Apodaca as a named defendant and adding Southeastern as a defendant. On 27 December 2013, in the North Carolina case, defendant International filed a motion to dismiss plaintiff Southeastern's claims or, in the alternative, "stay proceedings in favor of an already filed action in the U.S. District Court for the District of New Jersey." On or about 27 January 2014, plaintiff Southeastern filed a motion "to enjoin International Fidelity Insurance Company from proceeding with its parallel action in New Jersey[,]" (original in all caps), stating:

> Pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, Plaintiff Southeastern Sureties Group, Inc. ("Southeastern") moves to enjoin International Fidelity Insurance Company ("International") from proceeding in a parallel lawsuit filed by International relating to the same subject matter in the U.S. District Court of the District of New Jersey, Civil Action No. 13-CV-6077 (the "NJ Action'[']), against Southeastern and its president, Thomas M. Apodaca ("Mr. Apodaca").
>
> The NJ Action and this lawsuit (the "NC Action") arise out of a forfeiture on an Appearance Bond for Pretrial Release filed September 17, 2008 for the defendant Elder G. Cortez ("Mr. Cortez") in the amount of $570,000 in File No. 07 CRS 56935 in Johnston County, North Carolina (the "Cortez Bond"). Prior to International's adding Southeastern as a party to the NJ Action, Southeastern filed this NC Action, seeking to establish that Southeastern has no liability relating to the Cortez Bond and alternatively to recover damages from International based upon its misconduct in connection with the bond.
>
> In the absence of injunctive relief, International's prosecution of the NJ Action will interfere unduly and inequitably with the progress of this NC Action and with the establishment of Southeastern's rights properly justiciable in this Court. The NJ Action will also be unduly annoying, vexatious and harassing to Southeastern and Mr. Apodaca. Southeastern has no adequate remedy at law and will suffer irreparable damage in the event International is not enjoined from proceeding with the NJ Action.

On 10 February 2014, defendant Mr. Lowry filed a motion to dismiss plaintiff Southeastern's complaint.

On 3 March 2014, the trial court entered orders denying plaintiff Southeastern's motion to enjoin, denying defendant International's motion to dismiss, and granting defendant International's motion to stay. The order granting the motion to stay found:

> 1. This action was filed in Henderson County, North Carolina on November 1, 2013 contesting the validity of a bond executed on a criminal Defendant by the name of Cortez in 2008 in Johnston County, North

Carolina (not Henderson County, North Carolina). The Plaintiff alleges that the Plaintiff was an agent of the Defendant International Fidelity Insurance Company (IFIC) but that Defendant Lowry was not authorized to attach IFIC's Power of Attorney to the bond issued in the Cortez criminal action. Other causes of action raised by the Plaintiff in this action against IFIC include Declaratory Judgment action, breach of duty, negligence and allegations that IFIC is estopped to deny invalidity of the bond. This Court specifically notes that all issues concerning the Defendant Cortez bond forfeiture in Johnston County, North Carolina have been resolved by the decision of the North Carolina Court of Appeals.

2. A suit was initiated in the United States District Court for the District of New Jersey captioned International Fidelity Insurance Company (hereinafter referred to as "IFIC"), Plaintiff vs. Thomas M. Apodaca (hereinafter referred to as "Apodaca") on October 11, 2013 in file #13-CV-6077 wherein IFIC was seeking indemnification from Defendant Apodaca regarding losses with the bond issued in the Cortez criminal action. This federal suit was amended on November 21, 2013 by the Plaintiff IFIC by adding Southeastern Sureties Group, Inc. (hereinafter referred to as "Southeastern") as a party Defendant in the New Jersey action subsequent to the filing of this action in Henderson County.

3. Plaintiff Southeastern Sureties Group, Inc. (Southeastern) is a North Carolina legal entity utilized by Apodaca in his bonding business. Exhibits from the Secretary of State of North Carolina and the North Carolina Department of Insurance indicate that Apodaca is the registered agent, President and sole officer of Southeastern. Bail bondsman statutes for the State of North Carolina require a natural person to write bail bonds.

   Documentation from the North Carolina Department of Insurance verifies that Apodaca is licensed to write bonds for the Defendant IFIC in the State of North Carolina. Plaintiff Southeastern Sureties Group, Inc.

and Apodaca appear to this Court to be one entity in [(sic)] the same for matters pertaining to the criminal Cortez bond which the subject matter of this North Carolina and New Jersey causes of action.

4. Apodaca has not been made a party Plaintiff to this cause of action 13 CVS 1778 in Henderson County. IFIC did not have a contractual relationship with Southeastern regarding surety bonds in North Carolina.

5. The issues in the above captioned matter include the following:

    a. Was the Defendant IFIC surety on the Cortez bond?

    b. Did Defendant IFIC release Plaintiff Southeastern Sureties Group, Inc., (Southeastern) from the bond?

    c. Has Defendant IFIC waived any claim against the Plaintiff Southeastern?

6. Issues in the federal action in New Jersey are identical in that the Plaintiff IFIC in New Jersey is seeking indemnification from Apodaca for costs, fees, damages or fines incurred by Plaintiff IFIC in the criminal Cortez bond pursuant to a contract between Plaintiff IFIC and Apodaca which contains an indemnification agreement.

7. The Plaintiff IFIC and Defendant Apodaca selected their exclusive forum in 2004 pursuant to Paragraph 24 of the contract being sued upon in the New Jersey federal action by the following language:

APPLICABLE LAW: In event of dispute or litigation, exclusive jurisdiction and venue shall lie in the State of New Jersey. The parties hereby agree that any legal action brought to enforce any of the rights of the parties under this agreement or arising out of any disputes between them shall be brought only in the State or Federal courts of New Jersey.

8. This Court has considered factors designated under NCGS 1-75.12 including the nature of the case, the

exclusive forum selected by the parties in 2004 (prior to the execution of the Cortez bond), the convenience of witnesses, applicable law, inappropriate choice of forum by the Plaintiff in 13 CVS 1778 and other practical considerations.

9. Plaintiff Southeastern argues substantive law from the State of New Jersey including matters such as the "Entire Controversy Doctrine"; the alleged fact that IFIC waived exclusive forum selection by filing suits in North Carolina regarding the Cortez criminal bond; and the inconsequential fact that IFIC moved its national headquarters from the State of New Jersey to the State of California. The Court has considered these matters and finds that these substantive issues may be raised by the Plaintiff Southeastern and/or Apodaca in the New Jersey Federal District Court if they choose to do so; however they are inapplicable in this North Carolina cause of action.

The trial court then concluded:

1. This matter is properly before the Court and the Court has jurisdiction of the subject matter of this action.

2. The real parties in interest to this action by contract selected the State of New Jersey as the exclusive legal forum and venue for determination of all disputes arising between Apodaca and IFIC.

3. Apodaca and Plaintiff Southeastern Sureties Group, Inc. are one in [(sic)] the same entity for the purpose of this North Carolina cause of action.

4. The New Jersey federal suit was chronologically first filed for the indemnification issues created and/or caused by the Cortez criminal bond forfeiture in Johnston County, North Carolina.

5. Litigation of the matter in New Jersey involves the same matters in the above captioned action in the State of North Carolina and is parallel and duplicative in content.

6. It is in the best interests of the parties in this Henderson County, North Carolina cause of action to

> litigate issues raised in File #13-CV-6077 in the Federal District Court for the District of New Jersey prior to proceeding further in the case at bar.

The trial court then ordered:

> 1. That Defendant IFIC's Motion of December 23, 2013 to Stay Proceedings until the completion of the action filed in the United States District Court for the District of New Jersey in File # 13-CV-6077 be and is hereby GRANTED.
>
> 2. Further proceedings in this North Carolina matter shall be stayed pending conclusion of litigation and appeals in the United States District Court for the District of New Jersey File # 13-CV-6077.

Plaintiff Southeastern appeals the order granting defendant International's motion to stay.

E. The Federal New Jersey Case During This Appeal

During the pendency of this appeal, in September of 2015, the federal New Jersey Court proceeded with the case and heard motions for summary judgment, sanctions, and to dismiss. *See International Fidelity Insurance*, ___ F. Supp. 2d ___. The federal court addressed some of the same legal issues raised in the case before us. *See id.* The federal court granted the summary judgment motion in part and denied the motion for sanctions and to dismiss; therefore, the federal court will be proceeding to trial on the remaining claims. *See id.*

F. The North Carolina Appeal

On 14 September 2015, this Court received a "MEMORANDUM OF ADDITIONAL AUTHORITY" from defendant International which included the September 2015 federal New Jersey Court decision; while the decision is not "additional authority" pursuant to North Carolina Rule of Appellate Procedure 28, it is relevant to this case. *See generally* N.C.R. App. P. 28. Nonetheless, defendant International presented us with the "memorandum" but made no argument regarding its effect on this case. Because of the unusual situation, this Court requested supplemental briefs addressing the effect, if any, of the federal ruling on this appeal. Defendant International's brief suggested this Court simply wait to see what happens in the federal case because it may moot the case before us. Of course, since we are considering an order staying the North Carolina action, simply waiting on the federal New Jersey

Court would as a practical matter affirm the trial court's order granting the stay. No party has filed a motion to dismiss this appeal.

Plaintiff Southeastern's brief addressing the federal New Jersey opinion notes several ways in which the North Carolina order on appeal has adversely affected its case in New Jersey. Plaintiff Southeastern notes that the New Jersey opinion "took judicial notice of an erroneous finding and conclusion . . . which is critical" by determining "that Apodaca and Southeastern are one entity in the same for matters pertaining to the criminal Cortez Bond." (Quotation marks omitted.); this particular finding is one of the primary bases of plaintiff Southeastern's arguments in this appeal. Plaintiff Southeastern also argues that the federal New Jersey opinion "dispel[s] International's representation [in North Carolina] that International had paid the settlement of the Cortez Bond, when that was not the case." Plaintiff Southeastern also reiterates its argument that the trial court applied the wrong standard of the "best interest of the parties" instead of the substantial justice standard which is required to grant a stay under North Carolina General Statute § 1-75.12. In light of the original briefs as well as the additional briefing of the parties on this unusual case, we will address the current appeal.

II. Stay

This case seems to present many potential legal issues including necessary parties, real parties in interest, collateral estoppel, and judicial estoppel which could be determinative, but those issues were not raised. We have had substantial difficulty addressing the issues which were actually argued, considering the absence of crucial documents such as the 1987 Contract and the absence of argument on the federal court decision. But we are bound by the arguments before us, and we will not address potential arguments that are not before us on appeal. *See Viar v. North Carolina Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360 (2005) ("It is not the role of the appellate courts, however, to create an appeal for an appellant.") Although the argument section of plaintiff Southeastern's brief seeks to fragment the issue into 14 separate issues, the only real issue on appeal is whether the trial court abused its discretion by granting the stay.

> When evaluating the propriety of a trial court's stay order the appropriate standard of review is abuse of discretion. A trial court may be reversed for abuse of discretion only if the trial court made a patently arbitrary decision, manifestly unsupported by reason. Rather, appellate review is limited to [e]nsuring that the decision could, in light of

> the factual context in which it was made, be the product of reason.

Home Indem. Co. v. Hoechst Celanese Corp., 128 N.C. App. 113, 117–18, 493 S.E.2d 806, 809–10 (1997) (citations, quotation marks, and brackets omitted).

> In determining whether to grant a stay under G.S. § 1-75.12, the trial court may consider the following factors: (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. of N. Carolina v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993).

Plaintiff Southeastern challenges several of the trial court's findings of fact and conclusions of law. The most significant portions of the order challenged in the current posture of the case are finding of fact 3 and conclusion of law 3, respectively: "Plaintiff Southeastern Sureties Group, Inc. and Apodaca appear to this Court to be one entity in [(sic)] the same for matters pertaining to the criminal Cortez bond[,]" and "Apodaca and Plaintiff Southeastern Sureties Group, Inc. are one in [(sic)] the same entity for the purpose of this North Carolina cause of action." Plaintiff Southeastern contends that "[t]he record does not support a finding of fact that Southeastern and Mr. Apodaca operate as one and the same." Although the "one and the same" determination is labelled both as a finding of fact and a conclusion of law, it is actually a conclusion of law since it addresses a legal conclusion about the relationship between Mr. Apodaca and plaintiff Southeastern, which would have to be based upon facts about the business entity and the individual. *See*, *e.g.*, *Statesville Stained Glass v. T. E. Lane Construction & Supply*, 110 N.C. App. 592, 597-98, 430 S.E.2d 437, 440-41 (1993) ("In the instant case, with certain exceptions not material to the disposition of this case, the court's findings regarding Lane's involvement in Lane Construction are supported by the evidence. Based on the evidence in the record, Lane was the chief executive officer, sole shareholder, and controller of Lane Construction. The evidence also supports the court's findings that plaintiff at all times dealt with Lane, and that Lane dissolved Lane Construction in July, 1989,

at which time Lane Construction owed business debts. However, these findings, even though supported by the evidence, cannot provide the basis for the court's conclusion of law that Lane Construction had no will or existence separate and apart from Lane, or that the stock control as exercised by Lane justifies piercing the corporate veil of Lane Construction." (quotation marks and brackets omitted)).

Plaintiff is essentially contending that defendant International should not be allowed to reverse pierce the corporate veil and reach through the corporation of plaintiff Southeastern to reach the individual Mr. Apodaca. But no issue of piercing the corporate veil was raised or argued before this Court and considering the entirety of the order in the context of this case, this determination appears to simply be a poorly-worded statement which recognizes the fact that plaintiff Southeastern is wholly owned and operated by Mr. Apodaca.[2]

But plaintiff is correct that this "one and the same" determination is not supported by the record to the extent that it could be read as a binding legal determination of the relationship between Mr. Apodaca and plaintiff Southeastern for purposes of this action or the federal New Jersey action. The only finding of fact which addresses Mr. Apodaca and plaintiff Southeastern's relationship is finding of fact. 3: "Plaintiff Southeastern Sureties Group, Inc. (Southeastern) is a North Carolina legal entity utilized by Apodaca in his bonding business. Exhibits from the Secretary of State of North Carolina and the North Carolina Department of Insurance indicate that Apodaca is the registered agent, President and sole officer of Southeastern." Finding of fact 3 cannot support a conclusion of law that Mr. Apodaca and plaintiff Southeastern are "the same entity for the purpose of this North Carolina cause of action." *See id.* Indeed, Mr. Apodaca is not even a party to this case, so the trial court would be unable to properly make a determination as to any potential individual liability. In addition, since no party has argued a theory of "reverse piercing" of the corporate veil to impose individual liability upon Mr. Apodaca and no party has sought to make him a party to this case in North Carolina, the conclusion that Mr. Apodaca and Southeastern are "one and the same" was not necessary for the trial court's consideration of the motion to stay. Because we have concluded that the trial court could not properly determine that Mr. Apodaca and plaintiff Southeastern were "one and the same," to the extent that the

2. Again, we note that the 1987 Contract is not part of our record, but it initially formed the relationship between Mr. Apodaca and defendant International before the creation of plaintiff Southeastern.

federal New Jersey Court did rely upon that determination, such reliance is misplaced.

Aside from the propriety of the trial court's conclusion of law, we note that the order on appeal is a stay order, which is necessarily a preliminary determination based upon limited information. *See generally* N.C. Gen. Stat. § 1-75.12 (2013). A trial court's determination in a preliminary order of any important substantive factual or legal issue which may affect the outcome of a case should rarely, if ever, be solely relied upon to support a trial court's later substantive ruling on an issue. An order under North Carolina General Statute § 1-75.12 for a stay of proceedings is necessarily a preliminary order which is entered before the case has been developed by discovery.[3] *See generally id.* In fact, North Carolina General Statute § 1-75.12(b) recognizes that as a case develops, modification of a stay order may become necessary:

> (b) Subsequent Modification of Order to Stay Proceedings. - In a proceeding in which a stay has been ordered under this section, jurisdiction of the court continues for a period of five years from the entry of the last order affecting the stay; and the court may, on motion and notice to the parties, modify the stay order and take such action as the interests of justice require. When jurisdiction of the court terminates by reason of the lapse of five years following the entry of the last order affecting the stay, the clerk shall without notice enter an order dismissing the action.

N.C. Gen. Stat. § 1-75.12. We also realize that the New Jersey federal court may have considered information which was not before either the North Carolina trial court or this Court and that it may have reached the same conclusions even without any reliance upon the North Carolina stay order. But since the conclusion of law, as stated in both finding of fact 3 and conclusion of law 3, is not supported by the other findings of fact, it was made in error and both finding of fact 3 and conclusion of law 3 should be stricken from the stay order.

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3. An order granting a stay is comparable to a temporary injunction, so we find our Supreme Court's directive regarding the effect of a temporary injunction instructive: "The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing." *Huskins v. Hospital*, 238 N.C. 357, 362, 78 S.E.2d 116, 120-21 (1953).

Plaintiff Southeastern also argues in its supplemental brief addressing the federal New Jersey opinion that it "dispel[s] International's representation [in North Carolina] that International had paid the settlement of the Cortez Bond, when that was not the case." But again, the evidence presented before the federal New Jersey court was not necessarily evidence that was before the trial court when considering whether or not to issue a stay, the trial court made no findings on this issue, and no argument was presented on this issue until the supplemental briefs to this Court filed after the New Jersey order, so we cannot address this factual issue. As we have previously noted, plaintiff Southeastern is able to pursue a modification of the stay "as the interests of justice require."[4] N.C. Gen. Stat. § 1-75.12.

Plaintiff Southeastern also contends that the trial court used the wrong standard, in concluding that a stay is in the "best interests" of the parties and not that it would work "substantial injustice" for the case to be tried in North Carolina. But reading the entire order and its findings and conclusions in context, it is apparent that the trial court considered the relevant factors in *Lawyers Mut. Liab. Ins. Co. of N. Carolina*, 112 N.C. App. at 356, 435 S.E.2d at 573. The stay order does not have to use the "magic words" of "substantial injustice" where it is clear from the entire order that the trial court was in fact considering the appropriate factors and making the proper determination pursuant to North Carolina General Statute § 1-75.12. Use of the term "best interests" may be poor draftsmanship, but it does not rise to the level of reversible error.

Having addressed plaintiff Southeastern's major arguments on appeal, we turn back to the remainder of its argument. Plaintiff Southeastern challenges or at least mentions virtually every finding of fact and conclusion of law in the 14 headings in its arguments in its original brief. Most of the findings of fact are simply an identification of the parties, the issues, and a recitation of the long procedural history of this case, and they are supported by the record. We note again that this is a stay order; it is a preliminary order which does not purport to make a final determination of any disputed fact or substantive legal issue. *See generally* N.C. Gen. Stat. § 1-75.12. The trial court's order made findings of fact regarding the relevant factors. *See Lawyers Mut. Liab. Ins. Co. of N. Carolina*, 112 N.C. App. at 356, 435 S.E.2d at 573. As noted above, the

4. This opinion should not be read as suggesting or commenting in any way on the propriety or merit of a motion to modify pursuant to North Carolina General Statute § 1-75.12(b); we merely note that the avenue is available for plaintiff Southeastern to pursue and modification of the stay is not the role of this Court. *See generally* N.C. Gen. Stat. § 1-75.12.

trial court's conclusion of law regarding the legal relationship between Mr. Apodaca and plaintiff Southeastern was not necessary for purposes of the stay order, so the order is proper even without that conclusion of law. Because the federal New Jersey action was filed first and all of the parties are currently litigating the ultimate issue in this case, which is who should be liable for the loss associated with the bond forfeiture, the trial court's issuance of a stay was not "a patently arbitrary decision, manifestly unsupported by reason." *See Home Indem. Co.*, 128 N.C. App. at 117–18, 493 S.E.2d at 809–10. Given the multiple parties and issues in dispute, the trial court's order essentially "recognizes the practical reality" that the New Jersey federal court "is better able to arrive at a more comprehensive resolution of the litigation, given the broader scope of claims and parties before it." *Wachovia Bank v. Harbinger Capital Partners Master Fund 1, Ltd.*, 201 N.C. App. 507, 521, 687 S.E.2d 487, 496 (2009). The federal court's well-reasoned opinion which has determined that it is the proper jurisdiction for litigating the claims arising from the contractual relationships between the parties only serves to underscore the trial court's determination.

III. Conclusion

We strike finding of fact 3 and conclusion of law 3 from the stay order, but because the trial court did not abuse its discretion in granting the stay, we affirm.

AFFIRMED.

Judge BRYANT concurs in the result in separate opinion.

Judge HUNTER, Jr. concurs in part and dissents in part.

BRYANT, Judge, concurring in the result.

I write separately to note that while I concur in the result of the majority opinion, and concur in most of the analysis, I would affirm the trial court order without striking its finding of fact 3 and conclusion of law 3.

As the majority noted, this Court reviews a lower court's order granting a stay for abuse of discretion. *See Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993). A trial court is deemed to have abused its discretion when its decision is patently arbitrary or manifestly unsupported by reason. *Muter v. Muter*, 203 N.C. App. 129, 134, 289 S.E.2d 924, 928 (2010) (citation omitted). While the majority opinion upholds the trial court's

order in general as one that is not arbitrary, and therefore does not constitute an abuse of discretion, by striking finding of fact 3 and conclusion of law 3, the majority appears to determine the trial court did abuse its discretion as to that finding and conclusion.

With regard to the trial court's conclusion of law 3, that Apodaca and Southeastern are the same entity, Southeastern contends that this conclusion is in error because it is not supported by the evidence. The majority opinion as well as a portion of the dissenting opinion appears to agree with that contention. However, a review of the record and the previous incarnations of this case before this Court indicate that Apodaca was, at the time of the Cortez bonds, the sole owner and controller of Southeastern Sureties. Moreover, International Fidelity presented evidence that Apodaca signed various documents on behalf of Southeastern, acknowledged his liability for the actions of Southeastern, and conducted his bail bond/surety business in North Carolina through Southeastern. Based on our standard of review, I cannot agree that the trial court abused its discretion where there was sufficient evidence for the trial court to conclude that Apodaca and Southeastern Sureties are "one and the same entity" for purposes of granting International's motion to stay.

Other than as stated above, I concur in the majority opinion.

HUNTER, JR., Robert N., Judge, concurring in part, and dissenting in part.

I agree with the majority that this case is a bramble bush. *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL. I dissent with the majority opinion only on the remedy which is required in this matter. I also agree that North Carolina courts have subject matter jurisdiction over the controversy based upon the record in this case and the prior pending actions described in *Cortez I*, *Cortez II*, and *Cortez III* and my understanding that bond issues and their collateral consequences are *in rem* or *quasi in rem* matters under North Carolina law requiring resolution by state courts. N.C. Gen. Stat. § 1-75.8 (2013). I am not convinced that under existing federal case law that in this limited area state courts defer to federal courts. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983); *see also* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4241 (3d ed. 1998). However, I am not sure how this matter is adjudicated given that the federal court has been adjudicating the rights of the parties while this appeal is pending.

Based upon these findings, the court made the legal conclusion that Thomas Apodaca was the real party in interest in the litigation in Henderson County. I agree with the majority. This legal conclusion was made without competent evidence to support it. While I agree that this evidence would show that Apodaca and Southeastern may be in privity with one another, I am not convinced that the corporate entity can be set aside so lightly merely based on ownership and control of a corporation.

N.C. Gen. Stat. § 1-57 and Rule 17(a) of the Rules of Civil Procedure require that every claim be prosecuted in the name of the real party in interest. Should it appear to a court that a claim is not being prosecuted in the name of the real party in interest, then the procedure for the court to follow is to continue the matter to give the real party in interest an opportunity to plead or ratify the pleadings. "Where . . . a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court." *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978); *see Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd.*, 68 N.C. App. 246, 314 S.E.2d 801 (1984).

It does not appear from the record that Apodaca was given this opportunity. International's Motion to Dismiss filed on 5 February 2014 first suggests Apodaca should have been a party. During the hearing on the motion to dismiss, International stated, "Apodaca and International are the parties at interest here." From then, it was less than a month until the court entered its order granting a stay. It does not appear from the record that Apodaca has ever been served in this case. The court has found and concluded that Apodaca is not a party plaintiff. The record does not contain a motion to dismiss for failure to prosecute the claim in the name of the real party in interest. No party filed a third party complaint or motion to join Apodaca. I agree that the court can raise the issue on its own, but once raised it would be an error to enter a stay order until the real party in interest issue was resolved procedurally. I would hold the court should not have stayed the proceedings in this case until Apodaca intervenes, is joined, ratifies the complaint, or is given the opportunity to plead his case. Only then may the court take action *ex mero motu* to make him a party. Should the court do so it must recite findings of fact upon which such action should be taken.

SELTZLER v. SETZLER

[244 N.C. App. 465 (2015)]

JOHN BRYAN SETZLER, PLAINTIFF
v.
EVETTE LYNN SETZLER, DEFENDANT

No. COA15-209

Filed 15 December 2015

1. Child Custody and Support—attorney fees—good faith action

The trial court did not err by concluding that defendant was acting in good faith in bringing her child custody action and awarding attorney fees where it was undisputed that there was a genuine dispute over custody and plaintiff seemed to be arguing that a person requesting more time with her children was acting in bad faith when she should know that she was a poor parent. This position was unsupportable and contrary to settled law.

2. Child Custody and Support—attorney fees—defendant without sufficient funds

The trial court did not err by awarding attorney fees in a child custody action where its findings supported its conclusion that defendant was without sufficient funds to defray the necessary expenses of her suit.

3. Child Custody and Support—no cohabitation—finds and conclusions

In a child custody action, competent evidence in the record supported the trial court's findings of fact and those findings of fact in turn supported the conclusions of law that plaintiff did not engage in cohabitation. The primary legislative policy in making cohabitation, not just remarriage, grounds for termination of alimony was to evaluate the economic impact of a relationship on the dependent spouse and, consequently, avoid bad faith receipts of alimony. The trial court's inference finding that a desire to continue receiving alimony was not a primary motive in not remarrying supported the trial court's conclusion defendant and another were not cohabiting.

Appeal by plaintiff from orders entered 2 January and 9 May 2014 by Judge Jane V. Harper in Catawba County District Court. Heard in the Court of Appeals 8 September 2015.

Wesley E. Starnes for plaintiff-appellant.

Morrow Porter Vermitsky Fowler & Taylor, PLLC, by John F. Morrow, Sr., Natalie M. Vermitsky, and John C. Vermitsky, for defendant-appellee.

BRYANT, Judge.

The trial court did not err in awarding attorney's fees under N.C. Gen. Stat. § 50-13.6 where the court found that defendant acted in good faith in filing her custody action. Additionally, where the findings of fact are supported by competent evidence and, in turn, support its conclusions of law, we affirm the trial court's order concluding that defendant was not cohabiting as defined in N.C. Gen. Stat. § 50-16.9(b) and denying plaintiff's motion to terminate alimony.

Plaintiff-father and defendant-mother were married on 25 April 1992. During their marriage, the couple had two children. The parties subsequently separated on 12 April 2012. On 11 May 2012, plaintiff filed his Complaint seeking child custody, divorce from bed and board, equitable distribution, injunctive relief, and interim distribution. Defendant then filed an Answer and Counterclaim seeking child custody, child support, post separation support, permanent alimony, equitable distribution, and attorney's fees.

On 30 May 2013, the parties were divorced, and on 13 June 2013, a judgment of equitable distribution and an order of permanent alimony was entered. On 3 September 2013, plaintiff filed a motion, pursuant to N.C. Gen. Stat. § 50-16.9, to terminate his alimony alleging that defendant was cohabiting with William Wallace Respess. Defendant filed a reply to plaintiff's motion to terminate alimony on 13 September 2013. On 2 January 2014, following an evidentiary hearing, the trial court entered an order denying plaintiff's motion to terminate alimony. Plaintiff timely filed notice of appeal of this order.

On 22–25 April 2014, an evidentiary hearing was held on the issue of custody and support. At this hearing, plaintiff advocated for primary custody of the children, as did defendant. An order of custody was entered, which awarded permanent primary custody of the children to plaintiff and permanent secondary custody of the children to defendant. Additionally, it was ordered that the children would live primarily with their father and that plaintiff father would have final decision-making authority regarding the children.

Defendant also made a claim for attorney's fees, which plaintiff opposed. The trial court entered an order granting defendant's request

for attorney's fees. On 14 April 2014, plaintiff filed a Motion for Non-Disbursement which was denied on 27 May 2014. On 30 June 2014, plaintiff entered an amended notice of appeal from the 2 January 2014 Order on Alimony and the 27 May 2014 orders as to child custody, attorney's fees, and Plaintiff's Motion for Non-Disbursement.

On appeal, plaintiff argues that the trial court erred when it concluded that (I) defendant was acting in good faith in bringing her child custody action; and (II) defendant was not engaging in cohabitation.

I

[1] Plaintiff first argues that the trial court erred in concluding that defendant was acting in good faith in bringing her child custody action, and therefore, the trial court had no statutory authority to award attorney's fees to defendant. We disagree.

North Carolina General Statutes, section 50-13.6 provides the following:

> [i]n an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in *good faith* who has insufficient means to defray the expense of the suit.

N.C. Gen. Stat. § 50-13.6 (2013) (emphasis added). Therefore, the trial court is required to make two findings of fact in order to award attorney's fees under N.C.G.S. § 50-13.6: "that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citation omitted).

The Supreme Court of North Carolina has defined good faith as "honesty of intention, and freedom from knowledge of circumstances which ought to put [one] upon inquiry" that a claim is frivolous. *Bryson v. Sullivan*, 330 N.C. 644, 662, 412 S.E.2d 327, 336 (1992) (quoting *Black's Law Dictionary* 693 (6th ed. 1990)). Because the element of good faith "is seldom in issue . . . a party satisfies it by demonstrating that he or she seeks custody in a genuine dispute with the other party." 3-13 *Lee's North Carolina Family Law* § 13.92 (2014).

Here, it is undisputed that defendant was in a genuine dispute with plaintiff—plaintiff initiated a claim for custody and defendant brought a counterclaim for custody. Rather than challenging the evidence, offering any case law or precedent, or arguing that the legal conclusion of good faith was not supported by the facts found by the trial judge, plaintiff's sole argument seems to be that a person who requests more time with her children in her claim for custody is acting in bad faith when she should know that she is a poor parent. Almost seven pages of plaintiff's brief are dedicated to factual findings regarding defendant's struggle with drug addiction. In order to accept plaintiff's position, this Court would have to find that some parents should simply know that, because they are unfit parents or have made mistakes in the past, they will lose any attempts to modify custody arrangements, and therefore any attempts to do so could not be made in good faith. To support such an outcome would be to negate the efforts made by parents, such as defendant, to correct previous mistakes and become better parents and would serve to bar such parents from bringing custody actions. This position espoused by plaintiff is unsupportable and contrary to settled law. This portion of plaintiff's argument is overruled.

[2] The second finding of fact the trial court must make when awarding attorneys' fees under N.C.G.S. § 50-13.6 is that the party to whom attorneys' fees are being awarded "has insufficient means to defray the expense of the suit." *Burr*, 153 N.C. App. at 506, 570 S.E.2d at 224.

Here, defendant's first Financial Affidavit filed 26 September 2012 reflects defendant's total net monthly income, gross less deductions, as $1,516.67, with anticipated fixed household expenses listed as $3,979.68. On 17 May 2013, defendant filed an Amended Financial Affidavit, which listed her total net monthly income, after deductions, as $820.00, with total anticipated fixed household expenses totaling $3,669.68. The Amended Financial Affidavit also noted the following:

> On 10/12/12 . . . [d]efendant was award [sic] lump sum post separation support in the amount of $33,000.00, which was payable on or about 12/1/12. The post separation award was for $5,500.00 per month for a period of six months, which will be exhausted at the time of this hearing on 6/3/13.

On 22 May 2013, defendant filed a 2nd Amended Financial Affidavit, which again listed defendant's total net income available after deductions as $820.00, with total anticipated household expenses listed as $3,735.68. The 2nd Amended Affidavit also listed a "one time cost of

$790.00 for brakes and rotors." The Financial Affidavits filed by defendant also noted that (1) defendant owns no real estate individually, and (2) defendant and plaintiff together own real estate having an approximate value of $2,319,393.00 and an approximate mortgage debt of $2,397,000.00.

In *Lawrence v. Tise*, this Court reversed and remanded a trial court order denying an award of attorney's fees where the trial court's finding that plaintiff-mother had the means to pay her attorney was not supported by the evidence. 107 N.C. App. 140, 153–54, 419 S.E.2d 176, 185 (1992). In *Lawrence*, the evidence revealed, *inter alia*, that plaintiff-mother

> incurred legal fees . . . in the amount of $6741.00; that her monthly gross income is $215.00 and that her monthly expenses exceed her gross income . . . and that she owns a home which she purchased in 1986 for $50,000.00 which has a mortgage of $40,000.00, and an adjoining vacant lot with a tax value of $10,000.00.

Id. at 153, 419 S.E.2d at 184.

Here, as in *Lawrence*, the evidence similarly shows that defendant had insufficient means to defray the costs of her suit. In the trial court's Attorney's Fee Order, entered 27 May 2014, the trial court found in Finding of Fact No. 4 that defendant had "insufficient means to defray the attendant expenses of her suit for custody." In Finding of Fact No. 8, the trial court stated as follows: "In the tax year 2013, Plaintiff's earned income was $613,464 (about $51,122 per month) and [d]efendant's earned income was $1,560 per month. Both parties have about the same earned income now as they did in 2013." In Finding of Fact No. 7, the trial court found, after reviewing three Attorney's Fees Affidavits, that, from 4 December 2013 up to April 2014, defendant had incurred some $8,419 in attorneys' fees and $1,228 in costs. The third affidavit, which covered the April trial and costs and preparation of defendant's closing argument, showed that defendant incurred fees in the amount of $16,075 and costs of $1,109.

Additionally, unlike the plaintiff-mother in *Lawrence*, here, defendant owns no real estate or other property individually. *See Lawrence*, 107 N.C. App. at 153, 419 S.E.2d at 184. The only property defendant does have an interest in she owns together with her husband and the mortgage debt encumbering the property exceeds the current market value of the property by approximately $77,000.00.

Accordingly, the trial court's findings of fact support its conclusions of law, specifically, that "[d]efendant is without sufficient funds with which to defray the necessary expenses attendant to her suit for custody, [and] . . . [d]efendant is entitled to an award of attorney's fees pursuant to N.C. Gen. Stat. § 50-13.6."

The trial court's findings of fact that defendant was acting in good faith and has insufficient means to defray the expense of the suit support its conclusion of law awarding attorneys' fees to defendant. Accordingly, plaintiff's argument is overruled.

II

[3] Plaintiff next argues that the trial court erred by concluding that defendant did not engage in cohabitation. Specifically, plaintiff contends that defendant and Respess have mutually and voluntarily assumed "those marital rights, duties, and obligations which are usually manifested by married people." N.C. Gen. Stat. § 50-16.9(b) (1995).

In reviewing orders entered by a trial court in non-jury proceedings, this Court is "strictly limited to determining whether the record contains competent evidence to support the trial court's findings of fact and whether those findings, in turn, support the trial court's conclusions of law." *Smallwood v. Smallwood*, ___ N.C. App. ___, ___, 742 S.E.2d 814, 820 (2013) (internal quotation marks and citation omitted). Further, in performing this review, this Court may not "engage in a *de novo* review of the evidence and substitute its judgment for that of the trial court." *Id.* (citing *Coble v. Coble*, 300 N.C. 708, 712–13, 268 S.E.2d 185, 189 (1980)). Neither is it for this Court "to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble*, 300 at 712–13, 268 S.E.2d at 189.

Section 50-16.9(b) of the General Statutes states in pertinent part that "[i]f a dependent spouse who is receiving postseparation support or alimony from a supporting spouse . . . remarries or engages in cohabitation, the postseparation support or alimony shall terminate." N.C. Gen. Stat. § 50-16.9(b). The statute defines "cohabitation" as:

> the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations.

Id. The North Carolina Supreme Court has formulated a two-part test for cohabitation: "[t]o find cohabitation, there must be evidence of: (1) a 'dwelling together continuously and habitually' of two adults and (2) a 'voluntary mutual assumption of those marital rights, duties and obligations which are usually manifested by married people.' " *Bird v. Bird*, 363 N.C. 774, 779–80, 688 S.E.2d 420, 423 (2010) (quoting N.C.G.S. § 50-16.9(b) (2009)).

This two-part test must also be applied in light of the legislative policy underlying N.C. Gen. Stat. § 50-16.9(b). For the first element of the test, the statutory text:

> reflects several of the goals of the "live-in-lover statutes," terminating alimony in relationships that probably have an economic impact, preventing a recipient from avoiding in bad faith the termination that would occur at remarriage, but not the goal of imposing some kind of sexual fidelity on the recipient as the condition of continued alimony. The first sentence [of the statute] reflects the goal of terminating alimony in a relationship that probably has an economic impact. "Continuous and habitual" connotes a relationship of some duration and suggests that the relationship must be exclusive and monogamous as well. All of these factors increase the likelihood that the relationship has an economic impact on the recipient spouse.

Craddock v. Craddock, 188 N.C. App. 806, 810, 656 S.E.2d 716, 719 (2008) (quoting 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.85, at 493–94 (5th ed. 1999)) [hereinafter *Lee's Family Law*].

For the second element of the cohabitation test, the goal is "to terminate postseparation support and alimony when the relation has an economic effect and when someone is acting in bad faith to avoid termination." *Smallwood*, ___ N.C. App. at ___, 742 S.E.2d at 818 (quoting *Lee's Family Law* § 9.85, at 494). This is because "the more indicia of 'marital rights, duties, and obligations,' the more chance that the decision not to marry is motivated only by a desire to continue receiving alimony." *Id.* at ___, 818 (quoting *Lee's Family Law* § 9.85, *supra*, at 494).

The trial court implicitly concluded that the first element of the cohabitation test was met, in that the trial court found that "the relationship between [d]efendant and Mr. Respess is habitual and monogamous and has had an economic impact, to [d]efendant's benefit." Therefore, the core issue is whether the trial court's conclusion that defendant and Respsess did not voluntarily and mutually assume those marital rights,

duties, and obligations which are usually manifested by married people was supported by its factual findings.

When determining whether a couple voluntarily assumes those marital rights, duties, and obligations which are usually manifested by married people, the trial court must consider the totality of the circumstances. *Smallwood*, ___ N.C. App. at ___, 742 S.E.2d at 819 (citation omitted). "Under the 'totality of the circumstances test,' a court must evaluate all the circumstances of the particular case, with no single factor controlling." *Id.* (citing *Fletcher v. Fletcher*, 123 N.C. App. 744, 750, 474 S.E.2d 802, 806, (1996).

In *Smallwood*, this Court held that the plaintiff and her paramour, Robinson, did not engage in marital conduct when, *inter alia*, the following facts were found by the trial court below: (1) Robinson maintained his own residence and did not keep clothes or other personal items at the plaintiff's residence; (2) Robinson did not pay any expenses for the plaintiff's residence, nor attend to any other chores at the plaintiff's residence; and (3) Robinson and plaintiff did not refer to each other as husband and wife. *Id.* at ___, 742 S.E.2d at 818–19.

Additionally, this Court has held that when the "parties [do] not share financial obligations, exchange gifts or purchase items for each other *without being reimbursed for the money spent*[,]" this factor can support a trial court's determination that a couple has not assumed those marital rights, duties, and obligations which are usually manifested by married people. *Russo v. Russo*, No. COA11-162, 2011 WL 6035580, *5 (N.C. Ct. App. Dec. 6, 2011) (unpublished) (emphasis added) (citations and quotation marks omitted).

In its Order Denying Motion to Terminate Alimony and Denying Motion for Civil Contempt entered 2 January 2014, the trial court made the following findings on the issue of cohabitation:

> (3) Defendant/Wife began a sexual relationship with William Wallace Respess sometime in March of 2013. The couple has been monogamous since said time. They spend virtually all overnights together except when Defendant's children are with her. They usually stay at Mr. Respess' residence. They have traveled together several times, sharing a room. They have spent time with both of their families, as well as numerous friends of both, and have entertained friends several times at Mr. Respess' residence. They have had family photographs made, some including Defendant's daughters. They are engaged to be married and plan on

marrying in mid-May, 2014, immediately after Mr. Respess is divorced from is [sic] present wife, from whom he separated in March of 2013.

(4) Defendant/Wife maintains her own residence, where Mr. Respess never spends the night. Neither party keeps clothes or other personal items at the home of the other.

(5) Financially, Mr. Respess has provided funds to Defendant or paid bills for her directly, on numerous occasions. Mr. Respess has made payments so Defendant would not lose her town home, her internet service, or the furniture she was buying on time. Some of the funds he has provided were for everyday living expenses. The consent judgment entered by Plaintiff and Defendant on June 13, 2013, included a provision for Defendant to receive a 2007 BMW vehicle which she would "immediately trade . . . for a newer vehicle to be titled in her name." Defendant was unable to get credit for this purchase, despite Mr. Respess' willingness to co-sign the note, and Mr. Respess then bought the 2008 Buick automobile she had chosen, in his name. He also assisted her with car payments on this car (which she drives) and has added it to his car insurance policy.

(6) Both Defendant and Mr. Respess described all of the above transactions as "loans." While the Court is not convinced that their original intent was that these funds be "loans," it is undisputed that Defendant, upon receiving $200,000 via a Qualified Domestic Relations Order from a retirement account of Plaintiff/Husband's (pursuant to the consent judgment), promptly paid Mr. Respess all that they agreed she owed him. That amount was paid on October 5, 2013, in the amount of $19,844.00; part of said funds was attorney fees Defendant owed for Mr. Respess' representation of Defendant in this matter.

(7) Mr. Respess has also given Defendant a diamond engagement ring (in September, 2013), two outfits, a blouse, and two pieces of luggage. Mr. Respess has paid all the costs of the parties' trips together. When they eat out together, Mr. Respess pays. When they cook in together, he usually pays for the groceries.

> (8) Mr. Respess and Defendant expect him to function as a stepparent to Defendant's daughters, and he has already begun assuming that role. For example, Mr. Respess attended the school orientation for the girls in August along with . . . Defendant. Defendant and Mr. Respess attend Sunday School together on the Sundays when the girls are not with Defendant.
>
> (9) Defendant and Mr. Respess have told no one that they are married. They tell everyone they are engaged. They have no joint banking accounts.
>
> . . .
>
> (12) Here the relationship between Defendant and Mr. Respess is habitual and monogamous and has had an economic impact, to Defendant's benefit. But the Court is not convinced that the Defendant's motivation, in not marrying Mr. Respess, is to continue receiving alimony. First, of course, is the legal impediment of Mr. Respess' current marital status. But also, this couple plans to marry as soon as they legally can, which will result in the loss, by Defendant/Wife, of more than four years of the five years alimony for which she bargained. If Defendant wanted to keep the alimony coming, these marriage plans should not be made. Continuing to receive alimony does not appear to be her primary motivation, much less her only one.
>
> (13) The above consideration, along with the separate residential arrangements, offset the other facts which would favor allowing Plaintiff/Husband's Motion to Terminate Alimony.

Here, like the couple in *Smallwood*, defendant and Respess each maintained their own respective residences and Respess did not keep any clothes or personal items at defendant's home. Additionally, like the couple in *Smallwood*, defendant and Respess have not told anyone that they are married. Finally, it is worth noting that in *Russo*, an unpublished opinion, this Court noted that when parties did not share financial obligations or exchange gifts or purchase items for one another without being reimbursed for the money spent, this was a strong indication that the couple did not assume "those marital rights, duties, and obligations which are usually manifested by married people." *Russo*, 2011 WL 6035580 at *5.

Here, Respess provided funds to defendant or paid bills for her on numerous occasions, but she repaid him for this assistance. The trial court found that, while the parties' description of these transactions as "loans" was not a convincing one, defendant did pay Respess a sum of $19,844.00 on 5 October 2013, which was the amount the couple agreed defendant owed Respess. Thus, the trial court's legal conclusion that defendant and Respess did not assume those marital rights, duties, and obligations which are usually manifested by married people was supported by the trial court's findings of fact.

The trial court's conclusion is also supported by the trial court's reasonable inference that defendant's motivation in not marrying Respess was not made in bad faith in order to keep the alimony coming. A trial judge is entitled, after considering all the evidence, to draw "inferences as are reasonable and proper under the circumstances, even though another different inference, equally reasonable, might also be drawn therefrom." *Hodges v. Hodges*, 257 N.C. 774, 780, 127 S.E.2d 567, 571 (1962) (citation and quotation marks omitted).

As stated previously, the primary legislative policy in making cohabitation, not just remarriage, grounds for termination of alimony was to evaluate the economic impact of a relationship on the dependent spouse and, consequently, avoid bad faith receipts of alimony. The trial court's inference finding that a desire to continue receiving alimony was not a primary motive in not remarrying is yet another factual finding that supports the trial court's conclusion defendant and Respess were not cohabiting.

Again, we reiterate that this Court does not review the trial court's order *de novo*, nor can we substitute our judgment for that of the trial court. *See Coble*, 300 N.C. at 712–13, 268 S.E.2d at 189. Here, competent evidence in the record supports the trial court's findings of fact and those findings of fact in turn support the conclusions of law. Accordingly, plaintiff's argument is overruled.

We find that the record supports the orders of the trial court concluding (I) defendant's child custody action was brought in good faith, and she is entitled to attorney's fees; and (II) defendant and Respess did not engage in cohabitation for purposes of terminating plaintiff's alimony payments to defendant.

AFFIRMED.

Judges GEER and TYSON concur.

STATE OF NORTH CAROLINA
v.
D'MARCUS DELTON BALLARD, DEFENDANT

No. COA15-335

Filed 15 December 2015

1. Robbery—armed—confession only evidence of defendant's involvement—corpus delicti rule

The trial court did not err by denying defendant's motion to dismiss charges related to the armed robbery of a convenience store. The corpus delicti rule applies when the confession is the only evidence that the crime was committed—not, as here, where the confession was the only evidence that defendant was the person who committed the crime. There was no dispute that two masked men shot up the convenience store and fled. As for the conspiracy charge, the Court of Appeals held that there was sufficient corroborative evidence to defeat application of the corpus delicti rule.

2. Sentencing—erroneous prior record level—within presumptive range of correct record level—harmless error

Where defendant's judgments of conviction erroneously listed his prior felony record level as II instead of I and the trial court subsequently corrected the error without a new sentencing hearing, the error—assuming it was not clerical—was harmless and defendant was not entitled to a new sentencing hearing. Defendant's sentence was within the presumptive range on both record levels.

Appeal by defendant from judgments entered 22 September 2014 by Judge Walter H. Godwin, Jr. in Martin County Superior Court. Heard in the Court of Appeals 24 September 2015.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Brent Kiziah for the State.

DIETZ, Judge.

In June 2013, two masked men robbed a convenience store at gunpoint. They shot up the store, leaving bullet holes and shell casings, and

fled in a getaway car. The store's employees and several customers outside witnessed the robbery. The store's security cameras also recorded the robbery.

Over the next month, police tried unsuccessfully to identify and apprehend the perpetrators and ultimately offered a reward for information. Defendant D'Marcus Ballard then came forward and told police he was one of the men who planned and participated in the robbery. He explained that the other men involved in the robbery murdered his cousin, and he was coming forward because he wanted justice. He provided police with details of the robbery that had not been released to the public.

Later, Ballard changed his story and insisted that he was not involved in the robbery. He claimed that he came forward to frame the men who killed his cousin and to get the reward money. At trial, the State introduced Ballard's statements, testimony from other witnesses, and the security footage. Ballard moved to dismiss based on the doctrine of *corpus delicti*—a seldom invoked legal doctrine that precludes a conviction where the only evidence that the crime occurred is the perpetrator's own testimony. The trial court denied his motion and, after the jury convicted him, Ballard appealed.

The *corpus delicti* rule does not apply here. To be sure, Ballard's own testimony is the only evidence that *he* participated in planning and executing the robbery. But there is no dispute that the robbery happened—the evidence includes security footage, numerous eyewitnesses, and bullet holes and shell casings throughout the store. The doctrine of *corpus delicti* applies where the defendant's confession is the only evidence that the crime occurred at all, not where the confession is the only evidence the defendant was the perpetrator. Accordingly, we find no error in Ballard's conviction.

With respect to Ballard's sentence, the trial court's judgment mistakenly indicated that Ballard's prior felony record level was II rather than I, a mistake the court later corrected without a new sentencing hearing. Even if we assume that the mistaken record level on the judgment form was not merely a clerical error, we must find that error harmless. Ballard's sentence was within the presumptive range at both record levels and this Court has repeatedly held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level. *See, e.g.*, *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005). Accordingly, we find no error.

Facts and Procedural History

On 27 June 2013, two masked men entered the FIDA Mart in Hamilton, North Carolina. There were four employees inside the store and some customers in the parking lot. One of the men pointed a revolver at a store employee and said "freeze." The men then began shooting, sending the store employees scrambling for cover and leaving bullet holes and shell casings throughout the store. The men quickly fled from the scene in a getaway car parked outside. Store security video recorded the incident.

Police interviewed the witnesses, reviewed the security camera footage, and collected the shell casings from the scene, but were unable to identify the perpetrators. Police eventually offered a reward for information about the perpetrators. Nearly a month later, on 23 July 2013, Defendant D' Marcus Ballard contacted police. Ballard explained that he was involved in the robbery, knew the identities of the other perpetrators, and wanted to come clean. He told police that he believed others who participated in the robbery killed his cousin and he wanted justice.

Ballard gave police a detailed explanation of his involvement in planning and committing the robbery, including details that police had not released to the public. Ballard also signed a three-page written confession containing the same information. Police then charged Ballard with attempted armed robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and four counts of assault with a deadly weapon with intent to kill.

At trial, the State called several witnesses who described what happened during the robbery. The State also introduced the store's surveillance video of the robbery. Ballard took the stand in his own defense and told the jurors that he was innocent. He explained that he learned about the robbery from the news media and confessed in an attempt to get back at gang members who killed his cousin. Ballard also moved to dismiss the charges based on the *corpus delicti* rule. The trial court denied the motion and the jury found him guilty of attempted armed robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and four counts of misdemeanor assault with a deadly weapon.

The trial court sentenced Ballard to consecutive sentences of 60-84 months in prison for the attempted robbery conviction, 20-36 months in prison for the conspiracy conviction, and 75 days for the four assault convictions.

Approximately one month after sentencing, the Department of Public Safety notified the trial court of a possible error on the judgment forms because the forms listed Ballard's prior felony record level as II when it should have been I. On 6 January 2013, the trial court corrected the judgments for the two felony convictions to accurately reflect Ballard's prior felony record level of I. The court did not hold a new sentencing hearing. Ballard timely appealed.

Analysis

I. The *Corpus Delicti* Rule

[1] Ballard first challenges the trial court's denial of his motion to dismiss based on the *corpus delicti* rule. For the reasons explained below, we reject Ballard's argument.

"It is well established in this jurisdiction that a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986). The "*corpus delicti* rule" requires "that there be corroborative evidence, independent of defendant's confession, which tend[s] to prove the commission of the charged crime." *Id.* Importantly, the *corpus delicti* rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it. As our Supreme Court has explained, whether the defendant was "the perpetrator of the crime" is not an element of *corpus delicti*:

> [T]he phrase "*corpus delicti*" means the "body of the crime." To establish guilt in a criminal case, the prosecution must show that (a) the injury or harm constituting the crime occurred; (b) this injury or harm was caused by someone's criminal activity; and (c) the defendant was the perpetrator of the crime. It is generally accepted that the *corpus delicti* consists only of the first two elements, and this is the North Carolina rule.

State v. Parker, 315 N.C. 222, 231, 337 S.E.2d 487, 492–93 (1985).

Here, Ballard argues that the trial court should have dismissed the charges based on the *corpus delicti* rule because "but for his statement, there was no independent evidence to involve him with the planning of the incident . . . or at the scene." With respect to the attempted robbery and assault charges, the fact that Ballard refers to the "incident" demonstrates why his argument is flawed. There is no dispute that two

masked men entered a convenience store, ordered the employees to freeze, began shooting when the employees ran for cover, and then fled in a nearby car. Thus, there is uncontested evidence that "the injury or harm constituting the crime" of attempted robbery and assault occurred and that "this injury or harm was caused by someone's criminal activity." The only unanswered question is *who* committed the crime. Ballard's confession answered this question and, as our Supreme Court held in *Parker*, a confession identifying who committed the crime is not subject to the *corpus delicti* rule. 315 N.C. at 231, 337 S.E.2d at 492–93.

Ballard's argument is slightly more complicated with respect to the conspiracy charge because, as our Supreme Court has held, in a conspiracy prosecution the *corpus delicti* is not the act itself but "the conspiracy to do the act." *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711, 712 (1933). There is no direct, tangible evidence that the men who shot up the convenience store had, before committing the act, conspired to do it. But we hold that there is sufficient corroborative evidence to defeat application of the *corpus delicti* rule.

First, the fact that two masked men entered the store at the same time, began shooting at employees at the same time, and then fled together in the same car, strongly indicates that the men had previously agreed to work together to commit a crime. Second, as part of his explanation for how he helped plan the robbery, Ballard provided details about the crime that had not been released to the public, further corroborating his involvement. Finally, as the Supreme Court noted in *Parker*, conspiracy is among a category of crimes for which a "strict application" of the *corpus delicti* rule is disfavored because, by its nature, there will never be any tangible proof of the crime:

> a strict application of the *corpus delicti* rule is nearly impossible in those instances where the defendant has been charged with a crime that does not involve a tangible *corpus delicti* such as is present in homicide (the dead body), arson (the burned building) and robbery (missing property). Examples of crimes which involve no tangible injury that can be isolated as a *corpus delicti* include certain "attempt" crimes, conspiracy and income tax evasion.

Parker, 315 N.C. at 232, 337 S.E.2d at 493. In light of the corroborative evidence present here, and the Supreme Court's discussion in *Parker*, we hold that the *corpus delicti* rule does not bar Ballard's conviction for conspiracy to commit armed robbery.

II. Sentencing Error

[2] Ballard next argues that he is entitled to resentencing on the convictions for attempted armed robbery and conspiracy to commit armed robbery because the judgments of conviction listed the wrong prior felony record level. As explained below, even if this was more than a mere clerical error, our precedent compels us to find the error harmless.

The parties concede that Ballard's prior felony record level at the time of sentencing was I, not II. But the judgments of conviction erroneously listed his record level as II. After the Department of Public Safety notified the trial court of this error, the trial court corrected the judgment forms without a new sentencing hearing.

The State contends that this was simply a clerical error and the trial court properly corrected it without the need for a new sentencing hearing. Even if we assume that the error was not merely a clerical one, the error is harmless. Ballard's sentence was within the presumptive range at both record levels and this Court repeatedly has held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level. *See, e.g.*, *State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005); *State v. Rexach*, No. COA14-1012, 2015 WL 1201250, 772 S.E.2d 13 (N.C. Ct. App. 2015) (unpublished) ("An error in the calculation of a defendant's prior record level points is deemed harmless if the sentence imposed by the trial court is within the range provided for the correct prior record level."); *State v. Dilworth*, No. COA13-856, 2014 WL 1795180, 759 S.E.2d 711 (N.C. Ct. App. 2014) (unpublished) ("We have held that an error in the calculation of felony prior record level points is harmless or not prejudicial if the sentence imposed by the trial court is within the range established for the correct prior record level."). Thus, even if we assume the mistake on the judgment forms was not merely a clerical error, our precedent establishes that the error was harmless.

Conclusion

We find no error in Defendant's convictions and sentence.

NO ERROR.

Judges HUNTER, JR. and DILLON concur.

STATE v. BIDDIX

[244 N.C. App. 482 (2015)]

STATE OF NORTH CAROLINA
v.
MARK ALLAN BIDDIX

No. COA 15-161

Filed 15 December 2015

Appeal and Error—guilty plea—writ of certiorari—procedure—exercise of discretion declined

Defendant's petition for a writ of certiorari was denied and his appeal was dismissed where he attempted to raise an issue about whether his plea agreement was the product of informed choice. The issue defendant raised on appeal was not listed as a ground for a statutory appeal under N.C.G.S. § 15A-1444 and defendant petitioned the Court of Appeals for a writ of certiorari, which rests with the discretion of the Court. However, the issue defendant raised is not stated as a basis for the issuance of the writ of certiorari under Rule of Appellate Procedure 21. While Appellate Rule 2 may be used to suspend the procedural requirements of Rule 21 to prevent a manifest injustice, the Court of Appeals declined to do so.

Judge GEER concurring in part and dissenting in part.

Appeal by defendant from judgment entered 20 May 2014 by Judge Eric L. Levinson in Catawba County Superior Court. Heard in the Court of Appeals 25 August 2015. Court of Appeals' initial opinion filed 6 October 2015 and withdrawn 23 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Tarlton Law PLLC, by Raymond C. Tarlton, for defendant-appellant.

TYSON, Judge.

Mark Allan Biddix ("Defendant") appeals from judgment entered following his plea of guilty to manufacturing methamphetamine, two counts of conspiracy to manufacture methamphetamine, ten counts of possession of an immediate precursor chemical used to manufacture methamphetamine, and continuing a criminal enterprise. Defendant does not have a statutory right to appeal the issue he has raised. This issue Defendant presents is also not listed as eligible for review to issue

a writ of certiorari pursuant to Appellate Rule 21. In our discretion, we decline to invoke Appellate Rule 2 to suspend the requirements of Rule 21. We deny Defendant's petition for writ of certiorari, and dismiss the appeal.

I. Background

On 20 May 2014, Defendant appeared before the Catawba County Superior Court and entered pleas of guilty to manufacturing methamphetamine, two counts of conspiracy to manufacture methamphetamine, ten counts of possession of an immediate precursor chemical used to manufacture methamphetamine, and continuing a criminal enterprise. Defendant also admitted to the existence of one statutory aggravating factor, that "defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." This aggravating factor was alleged in one of the three bills of indictment issued by the grand jury.

At the plea hearing, the trial court conducted a colloquy with Defendant pursuant to N.C. Gen. Stat. § 15A-1022. During the colloquy, Defendant stated he was aware that he was pleading guilty to the fourteen charged felonies and admitting to the existence of the aggravating factor in exchange for a consolidated, active sentence. Defendant was informed that the mandatory and minimum punishments were an active sentence of 58 months and the maximum punishment was 1,500 months in the Department of Correction. He was also informed that any sentence actually imposed rested within the discretion of the trial court. Defendant stated in open court that he understood the terms of the plea arrangement.

The prosecutor recited the factual basis for the plea. Defendant stipulated to the factual basis for entry and acceptance of the plea. Defendant and numerous other individuals manufactured methamphetamine inside a residence in the town of Long View, North Carolina. A search warrant was issued for the residence. Upon execution of the search, law enforcement discovered an operational methamphetamine lab. Chemicals used in the manufacturing of methamphetamine, such as pseudoephedrine and lithium, were found inside the residence. Defendant was responsible for the manufacturing of the drug. Following the State's recitation of the factual basis, defense counsel stated to the court:

> [Defendant] understands how dangerous it was. He understands the aggravating factors that have been presented. He understands the danger that he presented to others

> and himself and he's asking the Court to accept the active sentence on the Class C and to consider in mitigation that he cooperated when he was asked and that . . . his felony record is non-existent up until this point.

Under the "Plea Arrangement" section on the Transcript of Plea form, the document states, "SEE ATTACHED PLEA ARRANGEMENT." A document entitled "Plea Arrangement" attached to the Transcript of Plea states:

> The defendant shall plead guilty to the charges listed in the "Pleas" section on the Transcript of Plea. The defendant stipulates that he is a prior record level III with 6 prior points for felony sentencing purposes. The State does not oppose a consolidated active sentence judgment which shall be in the discretion of the Court.
>
> In exchange for this plea *and the State not seeking aggravating factors that may apply to this case*, the defendant expressly waives the right to appeal the conviction and whatever sentence is imposed on any ground, including any appeal right conferred by Article 91 of the Criminal Procedure Act, and to further waive any right to contest the conviction or sentence in any post-conviction proceeding under Articles 89 and 92 of the Criminal Procedure Act, excepting the defendant's right to appeal for (1) ineffective assistance of counsel, (2) prosecutorial misconduct, (3) a sentence in excess of the statutory maximum, and (4) a sentence based on an unconstitutional factor, such as race, religion, national origin, or gender.
>
> This plea agreement shall be revocable by the State upon defendant's filing of an appeal and the defendant hereby expressly waives his statutory rights that may apply under 15A-1335.

(emphasis supplied).

The "Plea Arrangement" document is dated 20 May 2014, the day of Defendant's plea hearing, and is signed by Defendant, defense counsel, and the assistant district attorney. At sentencing, the trial court did not address the language of the "Plea Arrangement" under which the State agreed to refrain from seeking aggravating factors, which may apply to this case. The court determined defendant's plea was entered voluntarily. "Consistent with the arrangement and recommendation,"

the court consolidated Defendant's fourteen convictions into one Class C felony judgment.

The court found the existence of one aggravating factor as stipulated by Defendant, and one mitigating factor. The court determined the factor in aggravation outweighed the factor in mitigation, and sentenced defendant within the aggravated range to a minimum of 100 and a maximum of 132 months in prison. No objection or question was raised before the trial court to challenge the sentence imposed. Defendant appeals.

II. Issues

Defendant argues the trial court erred by accepting his guilty plea as a product of his informed choice, where the terms of Defendant's written plea agreement are contradictory.

III. Right of Appeal

The State has filed a motion to dismiss Defendant's appeal, and argues two separate grounds in support of dismissal: (1) Defendant has no statutory right to appeal from his guilty plea; and, (2) Defendant failed to give timely notice of appeal. We agree that Defendant does not have a statutory right to appeal from the conviction entered upon his guilty plea.

Absent statutory authority, a defendant does not have any right to appeal from judgment entered upon his conviction. *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). A defendant's right to appeal in a criminal proceeding is entirely a creation of state statute. *Id.* The North Carolina General Statutes must specifically set forth the right for a criminal defendant to appeal. *Id.*

A. N.C. Gen. Stat. § 15A-1444

N.C. Gen. Stat. § 15A-1444 governs a defendant's right to appeal from judgment entered upon a plea of guilty. A defendant, who has entered a plea of guilty or no contest in superior court, is entitled to appeal as a matter of right the issue of whether the sentence imposed: (1) results from an incorrect finding of his prior record level; (2) contains a type of sentence disposition that is not statutorily authorized for his class of offense and prior record level; or (3) contains a term of imprisonment that is not statutorily authorized for his class of offense and prior record level. N.C. Gen. Stat. § 15A-1444(a2) (2013). The statute further provides:

> (e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979 [pertaining to appeals from

> motions to suppress], and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. . . .

N.C. Gen. Stat. § 15A-1444(e) (2013).

The issue Defendant has raised on appeal pertains to the voluntariness of his guilty plea and is not listed as a ground for a statutory appeal under N.C. Gen. Stat. § 15A-1444. Defendant petitioned this Court to issue the writ of certiorari to review the merits of his appeal and has cited subsection (e) of the statute. Defendant's petition for writ of certiorari was filed contemporaneously with his brief. Whether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion of this Court. N.C. R. App. P. 21(a)(1).

B. Appellate Rule 21

Although N.C. Gen. Stat. § 15A-1444(e) states a defendant who enters a guilty plea may seek appellate review by certiorari, Appellate Rule 21(a)(1) is entitled "Certiorari," and provides the procedural basis to grant petitions for writ of certiorari under the following situations: (1) "when the right to prosecute an appeal has been lost by failure to take timely action;" (2) "when no right of appeal from an interlocutory order exists;" or (3) to "review pursuant to [N.C. Gen. Stat.] § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2015). Defendant's petition under N.C. Gen. Stat. § 15A-1444(e) does not invoke any of the three grounds set out in Appellate Rule 21(a)(1).

The relationship between Appellate Rule 21 and N.C. Gen. Stat. §15A-1444 has been addressed by many prior precedents.

> Where a defendant has no appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e). However, our appellate rules limit our ability to grant petitions for writ of certiorari to cases where: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) the trial court denied defendant's motion for appropriate relief. N.C. R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C.

> Gen. Stat. § 15A-1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21.

State v. Jones, 161 N.C. App. 60, 63, 588 S.E.2d 5, 8 (2003) (citations omitted); *see also State v. Nance*, 155 N.C. App. 773, 775, 574 S.E.2d 692, 693-94 (2003) (citations omitted) ("[D]efendant does not have a right to appeal the issue presented here under G.S. § 15A-1444(a)(a1) or (a)(a2), and this Court is without authority under N.C. R. App. P. 21(a)(1) to issue a writ of certiorari."); *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (holding where defendant entered a guilty plea, this Court is "without authority to review either by right or by certiorari the trial court's denial of defendant's motion to dismiss the habitual felon indictment or defendant's assertion the judgment violates his constitutional rights"); *State v. Dickson*, 151 N.C. App. 136, 138, 564 S.E.2d 640, 641 (2002) ("this Court is without authority to issue a writ of certiorari" where the defendant had no statutory right to appeal from his guilty plea, and "had not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review pursuant to N.C. Gen. Stat. § 15A-1422(c)(3)"); *accord State v. Ledbetter*, __ N.C. App. __, __, __ S.E.2d __, __, No. COA15-414, 2015 WL 7003394, at *5-6 (N.C. Ct. App. Nov. 3, 2015), *State v. Miller*, __ N.C. App. __, __, 777 S.E.2d 337, 341 (2015); *State v. Sale*, __ N.C. App. __, ___, 754 S.E.2d 474, 477-78 (2014); *State v. Mungo*, 213 N.C. App. 400, 404, 713 S.E.2d 542, 545 (2011); *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008); *State v. Hadden*, 175 N.C. App. 492, 497, 624 S.E.2d 417, 420, *cert. denied*, 360 N.C. 486, 631 S.E.2d 141 (2006).

Defendant cites cases in which prior panels of this Court issued a writ of certiorari to review issues pertaining to entry of the defendant's guilty plea, even though the defendant had no statutory right to appeal under N.C. Gen. Stat. § 15A-1444(a). *See, e.g.*, *State v. Rhodes*, 163 N.C. App. 191, 592 S.E.2d 731 (2004) (holding this Court could issue the writ of certiorari to review the defendant's challenge to the trial court's procedures employed in accepting his guilty plea); *State v. Demaio*, 216 N.C. App. 558, 563-64, 716 S.E.2d 863, 866-67 (2011) (holding this Court could issue the writ of certiorari to review the defendant's argument that his plea was not the product of informed choice); *see also State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011); *State v. Keller*, 198 N.C. App. 639, 641, 680 S.E.2d 212, 213 (2009); *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006); *State v. Carter*, 167 N.C. App. 582, 585, 605 S.E.2d 676, 678 (2004); *State v. O'Neal*, 116 N.C. App. 390,

394-95, 448 S.E.2d 306, 310, *disc. review denied*, 338 N.C. 522, 452 S.E.2d 821 (1994).

In *State v. Bolinger*, the defendant contended the trial judge violated N.C. Gen. Stat. § 15A-1022 by accepting his guilty plea. 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987). Our Supreme Court held that "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea." *Id.* at 601, 359 S.E.2d at 462. The Court further held that "[d]efendant may obtain appellate review of this issue only upon grant of a writ of certiorari." *Id.* Defendant Bolinger failed to petition the Court for a writ of certiorari, and the Court *sua sponte* elected to review the merits of the defendant's argument. *Id.* at 601-02, 359 S.E.2d at 462.

The Court in *Bolinger* does not cite nor address the three grounds set forth to issue the writ of certiorari under Appellate Rule 21. The Court stated: "Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon pleas of guilty. For this reason we nevertheless choose to review the merits of defendant's contention." *Id.*

In cases which precede *Bolinger*, our Supreme Court has specifically stated where an apparent conflict exists between the General Statutes and the Appellate Rules, the Appellate Rules control. *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983); *State v. Elam*, 302 N.C. 157, 160-61, 273 S.E.2d 661, 664 (1981).

In *State v. Ahearn*, the defendant pled guilty to voluntary manslaughter and felonious child abuse. 307 N.C. 584, 601, 300 S.E.2d 689, 699 (1983). He argued the trial court erred in its determination of aggravating factors, and by accepting his guilty plea without a proper factual basis. *Id.* at 586, 300 S.E.2d at 689. With regard to the court's acceptance of Ahearn's guilty plea, and unlike here, without defendant filing a petition for writ of certiorari, the Supreme Court cited N.C. Gen. Stat. § 15A-1444(e), and stated, "if we are to consider this assignment of error, we must treat it as a petition for writ of certiorari, which we do." *Id.* at 605, 300 S.E.2d at 702.

In neither *Ahearn* nor *Bolinger*, does the opinion cite, address, or analyze the requirements of Appellate Rule 21. In cases where this Court issued the writ of certiorari to review issues surrounding guilty pleas under N.C. Gen. Stat. § 15A-1444(e), this Court also did not cite nor analyze the three grounds set forth in Appellate Rule 21 to issue the writ, or determine whether the facts or petition applied to the stated grounds. Other panels of this Court allowed certiorari by citing *Bolinger*

and reached the merits of the defendants' arguments pursuant to N.C. Gen. Stat § 15A-1444(e) for grounds not set forth in N.C. Gen. Stat. § 15A-1444(a) or Appellate Rule 21 without expressly suspending the Appellate Rules. *See e.g.*, *Demaio*, 216 N.C. App. at 563-64, 716 S.E.2d at 866-67.

C. Appellate Rule 2

Although the aforementioned cases do not cite nor discuss Appellate Rule 2, Rule 2 allows the appellate courts to suspend the requirements of the appellate rules, including Rule 21, to review an issue "[t]o prevent manifest injustice to a party." N.C. R. App. P. Rule 2.

Appellate Rule 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

Id.

The appellate rules "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." N.C. R. App. P. Rule 1(c); *see also Bailey v. North Carolina*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000) (citations omitted) (noting "suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns"). Under Appellate Rule 2, this Court has "discretion to suspend the appellate rules either 'upon application of a party' or 'upon its own initiative.' " *Bailey*, 353 N.C. at 157, 540 S.E.2d at 323.

Appellate Rule 2 "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). This Court's discretionary exercise to invoke Appellate Rule 2 is "intended to be limited to occasions in which a 'fundamental purpose' of the appellate rules is at stake, which will necessarily be 'rare occasions.' " *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations omitted).

On the record before us, Defendant has not demonstrated, and we do not find, the "exceptional circumstances" necessary to exercise our

discretion to invoke Appellate Rule 2 to suspend the requirements of Rule 21 to issue the writ to reach the merits of Defendant's argument by certiorari. *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300.

This Court has previously recognized the Court may implement Appellate Rule 2 to suspend Rule 21 and grant certiorari, where the three grounds listed in Appellate Rule 21 to issue the writ do not apply. In *State v. Starkey*, 177 N.C. App. 264, 268, 628 S.E.2d 424, 426 (2006), the State appealed from an order granting the trial court's own motion for appropriate relief. The Court cited *Pimental* and Appellate Rule 21, and stated the Court is procedurally limited to granting the writ of certiorari to the three circumstances set forth in the Rule, unless the Rule is suspended. *Id.* at 268, 628 S.E.2d at 426. The Court further stated:

> The State recognizes that its petition does not satisfy any of the conditions of Rule 21 and asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review the trial court's order. *See* N.C. R. App. P. 2 (granting this Court the authority to suspend the rules of appellate procedure to prevent manifest injustice to a party). We decline the State's request to invoke Rule 2 and deny the State's Petition for Writ of Certiorari.

Id.

Using Rule 2 to suspend the requirements of Rule 21 provides the appellate courts with a procedure to "prevent manifest injustice to a party." N.C. R. App. P. 2. This procedure also allows what may be disparate and apparently conflicting decisions of this Court to be harmonized.

D. *State v. Stubbs*

The concurring and dissenting opinion asserts the Supreme Court "held that this Court had jurisdiction to grant a petition for writ of certiorari even though it did not fall within the scope of Rule 21" in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015). The *Stubbs* case is factually and legally distinguishable from the facts and issues before us.

While we agree this Court retains jurisdiction, the issues before the Court in *Stubbs* do not pertain to the entry of a guilty plea. The opinion does not analyze whether the defendant had a right to appellate review following a guilty plea, or whether the defendant could seek review by certiorari under either N.C. Gen. Stat. § 15A-1444(e) or Appellate Rule 21.

In *Stubbs*, the defendant had filed a motion for appropriate relief, and argued his life sentence constituted cruel and unusual punishment

under the Eighth Amendment. The trial court granted the defendant's motion for appropriate relief, vacated the defendant's sentence, and resentenced him to a term of thirty years with credit for time served. *Id.* at 41, 770 S.E.2d at 75.

The State sought appellate review of the trial court's order and filed a petition for writ of certiorari in this Court. *Id.* The State's appeal before this Court resulted in the issuance of a lead opinion, a concurring opinion, and a dissenting opinion. *State v. Stubbs*, __ N.C. App. __, 754 S.E.2d 174 (2014), *aff'd*, 368 N.C. 40, 770 S.E.2d 74 (2015). The lead opinion determined it was proper to consider the State's appeal by certiorari "because one panel of this Court has previously decided the jurisdictional issue by granting the State's petition for a writ of certiorari to hear the appeal, we cannot overrule that decision." *Id.* at __, 754 S.E.2d at 177 n.2. According to the concurring opinion, this Court's subject matter jurisdiction to issue writs of certiorari is not limited to the circumstances set forth in Rule 21. *Id.* at __, 754 S.E.2d at 183. The dissenting opinion held this Court was without jurisdiction to hear the State's arguments by direct appeal or by certiorari where the defendant did not have a statutory right of appeal and none of the three grounds set forth in Appellate Rule 21 applied. *Id.* at __, 754 S.E.2d at 187.

The issue before the Supreme Court was whether this Court had subject matter jurisdiction to issue the writ of certiorari to review the State's appeal from the trial court's order granting the defendant's motion for appropriate relief. *Stubbs*, 368 N.C. at 41, 770 S.E.2d at 75.

The General Assembly set forth the circumstances in which an appeal from the trial court's ruling on a motion for appropriate relief may be taken in N.C. Gen. Stat. § 15A-1422(c):

> (c) The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review:
>
> (1) If the time for appeal from the conviction has not expired, by appeal.
>
> (2) If an appeal is pending when the ruling is entered, in that appeal.
>
> (3) If the time for appeal has expired and no appeal is pending, *by writ of certiorari*.

(emphasis supplied). In *Stubbs*, the State's appeal fell under subsection (c)(3). The Court stated the jurisdiction accorded by this statute "does not distinguish between an MAR when the State prevails below and an

MAR under which the defendant prevails." *Id.* at 43, 770 S.E.2d at 76. The Supreme Court held the appellate courts "ha[ve] jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court." *Id.*

After the Court determined the General Assembly had granted appellate courts *jurisdiction* to hear the State's appeal, the Court next addressed whether the State's appeal was permitted by the Rules of Appellate Procedure. Appellate Rule 21 formerly allowed the grant of certiorari "for review pursuant to N.C.G.S. § 14A-1422(c)(3) of an order of the trial court *denying* a motion for appropriate relief." N.C. R. App. P. 21 (2013). The defendant in *Stubbs* argued that under the language of the Rule, the State could not appeal from an order *granting* a motion for appropriate relief. *Id.*

The Supreme Court disagreed and stated:

> As stated plainly in Rule 1 of the Rules of Appellate Procedure, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." [N.C. R. App. P. 1(c)]. Therefore, while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.

Id. at 44, 770 S.E.2d at 76.

This case is distinguishable from *Stubbs* because issuance of a writ of certiorari under N.C. Gen. Stat. § 15A-1422(c) is specifically stated in Rule 21, and Rule 21 specifically allows for the writ of certiorari to issue to review rulings on motions for appropriate relief. On its face, prior to the amendment to Appellate Rule 21 and prior to when *Stubbs* was filed, Rule 21 limited the issuance of certiorari to those orders *denying* the motion for appropriate relief. The statute conferred jurisdiction on this Court to review rulings on motions for appropriate relief, and the language of the Rule listed procedures under which we exercise the statutory jurisdiction.

The Supreme Court amended Rule 21 to permit review of all *rulings* on motions for appropriate relief in accordance with the language of N.C. Gen. Stat. § 15A-1422(c)(3). N.C. R. App. P. 21 (2015). The Rule 21 amendment was effective and binding the day the *Stubbs* opinion was filed.

The General Assembly has enacted:

> The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges *as the Supreme Court may by rule provide*, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. The *practice and procedure* shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

N.C. Gen. Stat. § 7A-32(c) (2013) (emphasis supplied).

While statutes, such as N.C. Gen. Stat. § 1444(e), confer the *jurisdiction* upon this Court to hear appeals and grant the prerogative writs, the Supreme Court, through the Appellate Rules, has set forth the "practice and procedure" under which that jurisdiction may be exercised. *Id.*

For instance, while this Court retains and exercises *jurisdiction* to hear appeals from the trial courts as conferred by the General Statutes, the appeal will not be heard without the appellant's compliance with the "*practice and procedure*" set forth in Appellate Rule 9 for filing a sufficient record on appeal. N.C. R. App. P. 9.

Appellate Rule 21 does not address guilty pleas or N.C. Gen. Stat. § 15A-1444(e). It does not provide a procedural avenue for a party to seek appellate review by certiorari of an issue pertaining to the entry of a guilty plea. On 10 April 2015, and effective that date, the Supreme Court amended Rule 21. The language of the Rule was changed to allow certiorari to issue "for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court *ruling on* a motion for appropriate relief." N.C. Rule App. P. 21 (2015). The Supreme Court did not amend Appellate Rule 21 to allow a petition and issue the writ of certiorari to review orders entered on guilty pleas, or to otherwise permit the issuance of the writ of certiorari. The amendment to Rule 21 was in effect when the Stubbs opinion was filed. *Id.* Such amendment would have been wholly unnecessary under the dissenting opinion's analysis.

IV. Conclusion

Defendant does not raise any of the grounds as are set forth in N.C. Gen. Stat. § 15A-1444(a2). He does not have a statutory right to appeal from the judgment entered upon his guilty plea.

The provisions of Appellate Rule 21, which provide the appropriate "practice[s] and procedure[s]" for this Court to issue a writ of certiorari, guide our processes to exercise our jurisdiction as provided by § 15A-1444(e). *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *Elam*, 302 N.C. at 160-61, 273 S.E.2d at 664; *Ledbetter*, __ N.C. App. at __, __ S.E.2d at __ , 2015 WL 7003394 at *5-6; *Sale*, __ N.C. App. at __, 754 S.E.2d at 477-78.

The issue Defendant has raised is not stated as a basis for the issuance of the writ of certiorari under Appellate Rule 21. Defendant received a sentence entirely consistent with his guilty plea, acknowledgement of an aggravating factor, and understanding the sentence actually imposed rested within the discretion of the trial court. Defendant did not seek to withdraw his plea or seek a continuance allowed by statute. *See* N.C. Gen. Stat. § 15A-1023 (2013).

Even though we retain jurisdiction by statute, in the exercise of our discretion, we decline to invoke Appellate Rule 2 to suspend the procedural requirements under Rule 21 of the Appellate Rules to grant the writ of certiorari to review defendant's argument. Defendant's petition for writ of certiorari is denied and his appeal is dismissed.

DENIED and DISMISSED.

Judge BRYANT concurs.

Judge GEER concurs in part and dissents in part in separate opinion.

GEER, Judge, concurring in part and dissenting in part.

I agree with the majority opinion that defendant has no right to appeal, but I do not agree with the majority's conclusion that Rule 21(a)(1) of the Rules of Appellate Procedure limits this Court's ability to grant defendant's petition for writ of certiorari. Although the majority opinion purports to distinguish and limit the Supreme Court's recent decision in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015), the majority opinion's analysis and holding is squarely inconsistent with that opinion. Because I would grant the petition for writ of certiorari and review the merits of defendant's arguments, I must respectfully dissent.

The majority opinion acknowledges that defendant filed a petition for writ of certiorari based on N.C. Gen. Stat. § 15A-1444(e) (2013). The majority then asserts: "Although N.C. Gen. Stat. § 15A-1444(e) states a defendant who enters a guilty plea may seek appellate review by certiorari, Appellate Rule 21(a)(1) is entitled 'Certiorari,' and provides the procedural basis to grant petitions for writ of certiorari under the following situations: (1) 'when the right to prosecute an appeal has been lost by failure to take timely action;' (2) 'when no right of appeal from an interlocutory order exists;' or (3) to 'review pursuant to [N.C. Gen. Stat.] § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.' " The majority then concludes that because defendant's petition for writ of certiorari under N.C. Gen. Stat. § 15A-1444(e) does not invoke any of the three grounds set out in Rule 21(a)(1), this Court may not review the petition for writ of certiorari without suspending the Rules of Appellate Procedure pursuant to Rule 2.

However, the Supreme Court in *Stubbs* expressly held that this Court had jurisdiction to grant a petition for writ of certiorari even though it did not fall within the scope of Rule 21(a)(1). The Supreme Court, in a unanimous opinion, identified the issue before it in *Stubbs* as follows: "In this case we are tasked with determining if the Court of Appeals has subject matter jurisdiction to review the State's appeal from a trial court's ruling on a motion for appropriate relief ('MAR') when the defendant has been granted relief in the trial court." *Stubbs*, 368 N.C. at 41, 770 S.E.2d at 75. The Court concluded: "We hold that it does." *Id.*

In reaching this holding, the Supreme Court first emphasized: "The jurisdiction of the Court of Appeals is established in the North Carolina Constitution: 'The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.' N.C. Const. art. IV, § 12(2). Following such direction, the General Assembly has stated that the Court of Appeals 'has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice.' N.C.G.S. § 7A-32(c) (2014)." *Id.* at 42, 770 S.E.2d at 75-76. The Court pointed out further that the General Assembly expressly provided in N.C. Gen. Stat. § 15A-1422(c)(3) (2013) that a trial court's ruling on an MAR is subject to review by writ of certiorari. *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76.

Based on the Constitution and the statutory provisions, the Court then concluded that this Court had jurisdiction to review the granting of an MAR pursuant to a writ of certiorari:

> Notably, subsection 15A-1422(c) does not distinguish between an MAR when the State prevails below and an MAR under which the defendant prevails. Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," *id.* § 7A-32(c), and given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has jurisdiction to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.

Id.

The Court then specifically addressed the impact of Rule 21: "As noted by the parties and the Court of Appeals, the Rules of Appellate Procedure are also in play here." 368 N.C. at 43, 770 S.E.2d at 76. Rule 21(a)(1), at that time, only authorized review under N.C. Gen. Stat. § 15A-1422(c)(3) "of an order of the trial court *denying* a motion for appropriate relief." The defendant argued, based on Rule 21, that the Court of Appeals did not have jurisdiction to review, pursuant to a petition for writ of certiorari, an order granting an MAR.

The Supreme Court disagreed in language that cannot be reconciled with the majority opinion in this case. The Court first pointed out: "As stated plainly in Rule 1 of the Rules of Appellate Procedure, '[t]hese rules *shall not* be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.' *Id.* at R. 1(c)." *Stubbs*, 368 N.C. at 43-44, 770 S.E.2d at 76 (emphasis added). The Court then held: "Therefore, while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution." *Id.* at 44, 770 S.E.2d at 76.

In short, the Supreme Court held that while Rule 21 appears "to limit the jurisdiction of the Court of Appeals," Rule 21 cannot take away jurisdiction given to the Court of Appeals by the General Assembly. *Id.* In other words, if a statute grants the Court of Appeals authority to review an order pursuant to a writ of certiorari, then Rule 21 cannot limit that authority.

The majority opinion, however, points to N.C. Gen. Stat. § 7A-32(c) (2013), which grants the Court of Appeals jurisdiction to issue writs of certiorari, but further provides: "The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." The majority opinion then holds that Rule 21 may, as a matter of practice and procedure, limit the ability of the Court of Appeals to grant a petition for writ of certiorari to the three instances set out in Rule 21(a)(1). A review, however, of Rule 21 shows that the "practice and procedure" for petitions for writ of certiorari is set forth in Rule 21(b)-(f), setting out the requirements for filing, service, and content of petitions and responses.

The majority's reasoning regarding Rule 21(a)(1) is euphemistic. The majority opinion's holding limits the authority of this Court to grant a petition for writ of certiorari even in circumstances that the legislature, as authorized by the Constitution, has expressly granted this Court authority. This holding cannot be reconciled with *Stubbs*. Indeed, if the majority opinion's analysis were correct and Rule 21(a)(1) could, as a matter of practice and procedure, limit this Court's ability to grant a petition for writ of certiorari, then the Supreme Court would have held in *Stubbs* that the Court of Appeals did not have the authority to review the State's petition, because at the time the State filed its petition in the Court of Appeals, Rule 21 did not provide for granting a State's petition from an order granting an MAR.

While the majority opinion makes much of the fact that the Supreme Court amended Rule 21 effective on the date of the Supreme Court opinion, the majority overlooks the fact that the amendment was not made retroactive. Consequently, the relevant version of Rule 21 for purposes of understanding *Stubbs'* holding is the version in effect when the State filed its petition in the Court of Appeals -- a version that, under the majority opinion's holding, precluded the Court of Appeals from granting the State's petition. Yet, the Supreme Court in *Stubbs* held that the Court of Appeals had authority to grant the petition.

The majority, however, argues further that the amendment of Rule 21 "would have been wholly unnecessary under the dissenting opinion's analysis." To the contrary, *Stubbs* addressed only the jurisdiction of the Court of Appeals, which, under the State Constitution, is to be established by the General Assembly. The amendment to Rule 21 is still relevant to the Supreme Court. In order for the Supreme Court to have the ability to review petitions for writ of certiorari filed by the State seeking

review of an order granting an MAR, the Supreme Court was required to amend Rule 21.

In support of its holding, the majority opinion relies upon opinions of this Court asserting: "In considering [A]ppellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21." *State v. Jones*, 161 N.C. App. 60, 63, 588 S.E.2d 5, 8 (2003), *rev'd in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). The Supreme Court in *Stubbs*, however, establishes precisely the opposite rule. Because the State Constitution grants the General Assembly authority to decide the jurisdiction of the Court of Appeals, statutes granting authority to this Court prevail over Rule 21 when the rule conflicts with the statute. The decisions of this Court that are inconsistent with *Stubbs* can no longer be controlling authority and cannot support the majority opinion's holding.

The majority opinion also cites the Supreme Court decisions in *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983), and *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981), for the proposition that "our Supreme Court has specifically stated where there is a conflict between the General Statutes and the Appellate Rules, the Appellate Rules control." Neither of those decisions addressed Rule 21 or this Court's jurisdiction to grant a petition for writ of certiorari. Instead, they each addressed the circumstances under which an issue has been preserved for appellate review. *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *Elam*, 302 N.C. at 160-61, 273 S.E.2d at 664. Consequently, neither opinion supports the majority opinion given the more recent holding specifically addressing the Court of Appeals' jurisdiction in *Stubbs*.

I note in passing that even in the absence of *Stubbs*, I believe that the majority opinion violates *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). The majority dismisses this Court's decisions in *State v. Rhodes*, 163 N.C. App. 191, 592 S.E.2d 731 (2004), and *State v. Demaio*, 216 N.C. App. 558, 716 S.E.2d 863 (2011), even though those decisions applied the Supreme Court's decision in *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987). The majority is not free to disregard decisions of this Court and the Supreme Court simply because it disagrees with them.

In sum, I believe that *Stubbs* establishes that defendant has a right to seek review by petition for writ of certiorari pursuant to N.C. Gen.

Stat. § 15A-1444(e). Because, further, I would grant the petition for writ of certiorari and review the merits of defendant's arguments, I must respectfully dissent.

STATE OF NORTH CAROLINA
v.
GARY SCOTT GOINS

No. COA15-184

Filed 15 December 2015

1. Sexual Offenses—sufficiency of evidence—location of crime

In a prosecution for sexual offenses against his students by a high school wrestling coach, there was sufficient evidence to deny defendant's motion to dismiss one of the charges for crime against nature where defendant claimed there was insufficient evidence that the crime had occurred in North Carolina. While there was some testimony that the incident may have occurred at a tournament in North Dakota, there was also a video in which the victim described the incident occurring in his bedroom in North Carolina in great detail.

2. Appeal and Error—preservation of issues—objection to only some testimony

In a prosecution for sexual offenses against his students by a high school wrestling coach, the question of the admissibility of testimony about hazing was heard on appeal even though defendant objected to only some of the testimony. The preserved portions of the challenged testimony were intertwined with the unpreserved portions, and the Court of Appeals exercised its discretion to consider all of the testimony.

3. Evidence—sexual offenses—evidence of hazing—specific plan, intent, or scheme

In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court did not err under Rule of Evidence 404(b) by admitting testimony about hazing. While the hazing techniques utilized by defendant were not overtly sexual or pornographic, the testimony tended to show that defendant exerted great physical and psychological power over his students, singled out smaller and younger wrestlers for particularly harsh treatment,

and subjected them to degrading and often quasi-sexual situations. It was introduced to show a specific intent, plan, or scheme by defendant to create an environment within the wrestling program that allowed defendant to target particular students, groom them for sexual contact, and secure their silence.

4. Evidence—sexual offenses—evidence of hazing—narrative of case

In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court did not err under Rule of Evidence 403 by admitting testimony about hazing. It was reasonably necessary for the State to show that defendant's conduct was ongoing (almost a decade) and pervasive in order to explain how each complainant fell prey to defendant and how these alleged crimes continued unabated for so long. Moreover, the State's elicitation of the hazing testimony at trial was not excessive and it did not derail defendant's trial from the overall focus of establishing whether the crimes for which he was charged occurred.

5. Evidence—sexual offenses—bias of witness—relevancy—rape shield statute

In a prosecution for sexual offenses against his students by a high school wrestling coach, the trial court erred under Rules of Evidence 401and 412 by excluding evidence of a victim's motive to falsely accuse defendant. Defendant did not seek to cross-examine a prosecuting witness about his or her general sexual history but instead identified specific pieces of evidence. The bias evidence was relevant under Rule 401 and was not barred by Rule 412 (the Rape Shield Statute).

6. Evidence—bias of witness—no prejudice shown

Defendant failed to carry his burden under N.C.G.S. § 15A-1443(a) to show a reasonable possibility of a different result in a prosecution for sexual offenses against his students by a high school wrestling coach by excluding evidence of bias by a State's witness where the evidence of defendant's guilt was strong.

Appeal by Defendant from judgments entered 12 August 2014 by Judge Jesse B. Caldwell, III in Superior Court, Gaston County. Heard in the Court of Appeals 24 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Parish & Cooke, by James R. Parish, for Defendant.

McGEE, Chief Judge.

Gary Scott Goins ("Defendant") was convicted of committing numerous sex offenses against his students while serving as a teacher and wrestling coach at East Gaston High School ("East Gaston"). Defendant contends the trial court erred by: (1) denying Defendant's motion to dismiss one of his charges for insufficient evidence, (2) admitting evidence that Defendant utilized various "hazing" techniques against his student wrestlers, and (3) not allowing Defendant to introduce evidence of possible bias by one of the complainants. We find no error as to Defendant's first two challenges, and no prejudicial error as to the third.

I. Background

Defendant was a teacher and wrestling coach at East Gaston from August 1993 until June 2013. Defendant's employment with East Gaston ended after he was arrested and indicted for numerous sex offenses against three of his former wrestling students ("the complainants").

A. Allen's Testimony

Allen[1] testified at trial that he met Defendant in the mid-1990's at a wrestling tournament, when Allen was in eighth grade. Defendant invited Allen to start training with the East Gaston wrestling team the following school year. The practices were more intense than what Allen had been used to. The other wrestlers were "[b]igger guys, . . . a lot more defined, [a] lot more mature." The wrestlers and Defendant also used "vulgar" language during practices, and the wrestlers would sometimes get "choked-out" in the locker room – by other wrestlers or Defendant – through the use of an "illegal" wrestling maneuver. After Defendant choked-out a wrestler, "[h]e would just laugh . . . [and] kind of make a joke of it. . . . [It was] something that [you would see] fairly often in the wrestling room."

During the summer of 1997, Allen traveled with Defendant and the East Gaston wrestling team to a wrestling camp at Appalachian State University. The team stayed at a house near the university, and Allen was directed by Defendant to sleep in the same bed as Defendant. That night, Allen "woke up to [Defendant] grabbing [Allen's] hand, . . . putting it on

1. The names of former East Gaston students in this opinion have been changed to protect their identities.

[Defendant's] penis[,]" and masturbating. Allen was fourteen or fifteen years old at the time and weighed one hundred ten pounds.

Allen joined the East Gaston wrestling team in the fall of 1997, at the beginning of tenth grade. Allen continued to go on many team trips with Defendant, which often involved students sharing a hotel room with Defendant. It became "routine" that Defendant "always [had Allen] sle[ep] in the same bed" as Defendant. Allen woke up to Defendant using Allen's hand to masturbate in the middle of the night "probably over a dozen times" on various trips.

Allen also testified about a trip to a tournament in Florida that he took with Defendant and three other wrestlers. One evening, Defendant and the two upperclassmen on the trip, Earl and Frank, went into a drug store. Allen and another underclassman, George, were directed to stay in the car. After Defendant and the upperclassmen returned to the car, they all went back to the hotel room where they were staying. Allen testified that, once they were inside the hotel room,

> [Defendant] lock[ed] the door . . . [and he said something] like, "All right here we go," and then he – we started to kind of fight around, rumble around and . . . [George] and I [got] stripped down to our underwear. And then we found out what was in the bags. They dumped it all out on the bed; the mascara, the lipstick, eyeliner and the whole nine yards. [Defendant and the upperclassmen] commenced to decorating [us] like cheap hookers. They put lipstick on us, the eyeliner, eyelash[,] and then after they decorated us all up there, they started using the lipstick and the eyeliner to draw on us. They circled our nipples with the lipstick and then they started drawing rude comments all over our bodies. . . . [For instance, on George, they drew a] large arrow pointed down to his ass and then it said, ["]insert here["] . . . . [W]e tried [to fight them off] but they were larger than us and after a while we just kind of gave in to just ease the pain and . . . made it a game.

Defendant then directed Allen and George to "pose in provocative" positions, such as one of them "bent over on all fours . . . [and the other] standing behind him" like they were having anal sex, while Defendant took pictures.

Frank, Earl, and George testified about this incident at trial, and their testimony largely corroborated Allen's testimony. According to Frank and Earl, they also wrote things like "I'm a faggot[,]" "I am gay[,]" "I suck

dick[,]" and "I take it in the ass" on Allen's and George's bodies. Frank testified that Defendant kept the photos he took that evening in the top drawer of his filing cabinet at East Gaston. Frank further testified that initially he did not think the "gag" would end up being so "obscene" and that Defendant told Frank and Earl what to do throughout – including instructing them to force Allen and George into the provocative positions if they would not comply. Frank testified "[i]t was one of those things [that started off] . . . feel[ing] like it was [just] a little bit [of] hazing[,] until [he] actually realized what[ ] was going on; what [he] just did to those kids." Frank also testified he was afraid that "the same thing would happen to [him,] or [he] would be beaten[,]" if he did not comply with Defendant's commands because Defendant regularly "frogged, . . . punched, . . . kneed[,] . . . [or put in a] choke-hold" wrestlers who did not "do what he told [them] to do." Frank testified that the incident in Florida led, in part, to his quitting the team, giving up his title of team captain, and moving to another school to wrestle.

Regarding Defendant's general behavior on trips, Allen further testified that Defendant

> was a big fan of ripping people's underwear off. . . . Most of the time [he did it] in our travel van. . . . He would pull over and jump from the driver's seat to the back, pick somebody out, club them down on the back of the head, force them down, grab their underwear and just rip them off as hard as he could. . . .
>
> [Other times, wrestlers] had to stand on the bed [in a hotel room] and [Defendant] was standing on the bed with us, behind us, and we were on the edge of the bed and he had our underwear and he was, like, okay, now jump. And we'd have to jump off of the bed and we were dangling off the bed with him holding our underwear and him trying to pull them up to rip them off.

Although Defendant "did [this] to everybody[,]" Allen stated that Defendant targeted "mostly the smaller" wrestlers for this kind of treatment.

Allen testified Defendant began coming to Allen's house in the summer of 1998 to conduct "mental training sessions." These sessions always occurred while Allen's parents were at work. Defendant would take Allen into Allen's bedroom, lock the door, light a candle, and tell Allen to lie on his bed. Defendant would then run Allen through various relaxation and visualization exercises. However, during one of these

sessions, after Defendant told Allen to visualize finishing a rigorous work-out in his mind, Defendant directed Allen to stand, get completely naked, and pretend he was taking a shower, which Allen did. Defendant then told Allen to lie down on the bed, and Defendant began talking about a girl Allen had a crush on. Allen testified

> [Defendant] talked about how I liked her and how I thought she was pretty and stuff like that. And then he had a wig that he put on, a blonde wig. And he kind of said that ["Y]ou thought [that girl] was pretty and she turns you on. . . . [Y]ou want to be with her, have sex with her[,"] and stuff like that[,] and he would kind of take the wig and drape it across my body to kind of tickle me all the way down. And then after that, I was still naked at the time, and he performed oral sex on me while he was wearing the wig. And it was tickling me and he just continued the oral sex.

During another mental training session, Defendant told Allen to visualize that he was in "a car that was traveling . . . in a race."

> [Defendant said] I had to pump [my hand] to cross the finish line, to be first. And somewhere along the way [Defendant] pulled out his penis and put it in my hand to where I had to pump [Defendant's] penis . . . to make the car to go faster[.] . . . I had to pump to cross the finish line. . . . [Defendant then] ejaculated . . . in the cup of his hand. He said, ["N]ow, you've finished the race and you are tired and you are thirsty[,"] and he said, ["Y]ou need some water.["] And he . . . made me drink . . . his semen.

During another mental training session, Defendant instructed Allen to "act[ ] like [Defendant's penis] was an ice cream cone and that it was hot outside and that it was melting[,] and [Allen] need[ed] to try to lick the ice cream before it melted all the way off." Allen testified about a similar instance of sexual contact that occurred during a team trip to Fargo, North Dakota. Allen testified he did not report these instances because he was "scared[,] . . . didn't know who would believe [him]," and was worried about what people would say if they found out. Allen also "loved wrestling," was trying to earn a scholarship, and was concerned that reporting Defendant would negatively impact his wrestling career.

B. Brad's Testimony

Brad, Allen's younger brother, testified he wrestled at East Gaston from 2000 to 2004, but he began training with Defendant in 1997. At the

time, Brad was eleven years old, and he weighed around sixty pounds. He also began traveling with the team to tournaments. Brad testified these trips were

> no-holds-barred. . . . [P]hysical abuse became okay whether it was the older wrestlers beating the younger wrestlers up or whether it was [Defendant] getting mad at us, jump[ing] in the back seat and turning . . . his college ring around his finger and smacking us [on] the top of the head so it wouldn't leave [a] bruise [that people could see]. . . . [Defendant would place me or the other wrestlers in a] painful lock or maneuver where it's like wrenching [an] arm back to [the] point where I'm crying, or seeing another wrestler in tears. . . . And [Defendant was] just smiling the whole time. . . . [It was] just something that you had to deal with. . . .
>
> [Sometimes, Defendant would] come up behind us at any minute and just put his arm around us, [and] get[ ] us in a rear choke-lock[,] which isn't even a wrestling move, that's a [mixed martial arts] fighting move. [One time, a wrestler "lost control of [his] bodily functions" after being subjected to this maneuver.] . . .
>
> [O]ne of [Defendant's] favorite things used to be, he [would] make us hold-up our shirts. And we would lay on the bed . . . in [a] hotel room. We'd be laying on the bed and he [would] say, "All right, pick your shirt up." We would have to hold our shirt up and he'[d] say, "If you flinch, you're getting another["] . . . hit on the stomach with his bare hand[, and] . . . with his full force[.] . . . [Meanwhile, Defendant would say things like,] "You better not flinch. Don't be a pussy. Just take it." All the while smiling and laughing about it while I was in tears. . . .

Brad also testified that Defendant gave wrestlers extreme wedgies "if [they] made him mad, or if [they] did something wrong, or even . . . just for fun[.]" Brad "saw [Defendant give a wedgie] so bad to another wrestler one time [that] . . . when [Defendant] pulled [the wrestler's] underwear up, there was blood on it from where he had ripped [the wrestler's] anus[.]"[2]

2. Several former wrestlers testified they often would cut slits under the elastic of their underwear to minimize the force needed to rip the underwear from their bodies.

On one trip, Brad needed to use the bathroom while Defendant was driving the team back from a tournament. According to Brad, "I told [Defendant] I had to go to the bathroom . . . [and he said,] '[I]f you want to go to the bathroom, you better get naked[.] . . .' I said, okay. So I got my clothes off, he stops at [an] old skating rink . . . [and] he says, '[If] you got to go, you got to go.' He [made] me get out of the car naked, run out [into] that skating rink parking lot and pee and run back."

On another trip in 1999 or 2000, Defendant "forced [Brad] to get naked in front of him and all the other wrestlers[.]" Defendant then used pink athletic tape to give Brad some "underwear." Brad testified

> the tape was on my genitals, on my testicles, around my hips just like a pair of underwear would be. And at that point [Defendant] began to make me do exercises; jumping jacks and squats and push-ups in front of all the other guys while they were watching and he is telling me what to do with his pair of pink underwear on. And I'm in pain because it's pulling at parts of my body that shouldn't be pulled by tape and it's just hurting.

Brad testified about another incident when Defendant pulled down the pants of another smaller wrestler, Henry, in front of the other wrestlers and shaved Henry's genitals using a razor and a packet of mayonnaise. Henry also testified at trial and confirmed that he was shaved by Defendant in front of the other wrestlers.

In 2001, Defendant taped Brad to another younger wrestler, back to back, using heavy duty "mat" tape, and then Defendant and the older wrestlers, at Defendant's instruction, used "water guns to squirt . . . [their] face[s] and [their] eyes." Brad testified Defendant would sometimes get Brad or another "smaller wrestler . . . in some type of [hold] where they can't move their upper body . . . and [Defendant] would pull their arm back . . . and pull [out] a single armpit hair . . . while they're just wincing in pain. . . . [Defendant] would do [this] to their nipple hair as well." Brad testified that, "[f]rom as early as [he] can remember[,] . . . [Defendant had] a motto[ ] [during team trips:] . . . [']What happens on trips, stays on trips; don't be a pussy.['] "

Defendant also had Brad sleep in Defendant's bed on some trips. Beginning on a trip in 1998, when Brad was around twelve years old, Brad would sometimes wake up to Defendant "holding [Brad's hand] in a way to where [Brad's] hand [was] on [Defendant's] penis[.]" Other times, Brad would wake up to Defendant touching Brad's penis. Over the seven to eight years that Brad trained under Defendant, Brad slept

in the same bed as Defendant about thirty times, and this kind of thing occurred "[t]en or fifteen times."

Defendant began talking to Brad in May 1999 about having "mental training sessions[,]" which Defendant said had been very helpful for Brad's older brother, Allen. Brad was still twelve years old and weighed no more than ninety pounds. Defendant came over to Brad's house, and they went in Brad's room. Defendant turned off the lights, locked the door, placed a towel in front of a gap under the door, and lit a candle. Brad was instructed to lie on his bed and Defendant ran Brad through various relaxation and visualization exercises.

> [Then Defendant said,] "Okay, you're at a race track and you've got to win, you want to be the best. So let's do what we've got to do to be the best.["] I'm just laying down on my bed . . . [a]nd he said[, "]I want you to reach up and you've got to grab the throttle." So I reach my hand up and grab . . . his finger.

Defendant instructed Brad to squeeze his finger harder to go faster and to loosen his grip as he imagined going around turns.

> [Then Defendant said,] "[O]kay, no[w] you're back from the tournament and some really pretty girls invited you over to their house and their parents are out of town . . . [a]nd they invited you over to their house and their parents aren't in and they've got a hot tub and they want you to get in the hot tub.["]

Defendant instructed Brad to "take [his] clothes off to get into the hot tub." Brad removed all of his clothes except for his underwear, but Defendant told him "to get completely naked" and sit on the floor. Defendant talked "about the girls in the hot tub and how pretty they were and how they are trying to kiss" Brad. Defendant then instructed Brad to put his clothes back on and lie on the bed. Defendant had Brad run through the race car exercise again, but this time when Brad "[r]each[ed] up and grab[bed] the throttle[,]" Defendant's penis was in his hand. Brad testified that an almost identical incident happened two months later in his room, and it happened two more times the following summer.

Brad testified he did not report these incidents because he was "scared . . . [and other people] trusted [Defendant] so much" that he worried no one would believe him. He also "wanted to be on [the East Gaston wrestling] team [ever] since [he] was a kid . . . [and the] [l]ast

thing [he] wanted to do was to stop that from happening." The final incident of sexual contact with Defendant occurred in 2001, toward the end of Brad's tenth grade year, when Brad was awakened by Defendant placing Brad's hand on Defendant's penis. Around that same time, Brad noticed that Defendant started regularly sleeping with another wrestler on trips, Carl.

C. Carl's Testimony

Carl wrestled at East Gaston from 2001 to 2005 and started training with Defendant when he was still in eighth grade. Two former assistant coaches for the East Gaston wrestling team testified that Carl had a troubled home life, was "[v]ery shy[,]" and needed "somebody to pay . . . attention" to him. One coach testified "it seemed like [Carl] wanted somebody to love, or somebody to love him. And [when] anybody . . . would show [Carl] attention[,] he was right there with him, almost like a little puppy dog."

Carl testified he was thirteen and weighed less than one hundred pounds when he started training with Defendant. In June 2001, he travelled with the East Gaston wrestling team to a wrestling camp in Pembroke. Carl had already roomed with one of the assistant coaches the first night of camp, but Defendant arrived on the second day and told the other coach: "I'm going to take [Carl] with me [for the rest of camp]." Carl was excited by this because he "looked-up" to Defendant. That night, Defendant conducted a "mental training session" with Carl and ran Carl through some relaxation and visualization exercises. He told Carl to imagine racing on a luge. Defendant had Carl squeeze Defendant's finger to go faster. Defendant removed his finger and told Carl to grab again. This time, Carl was holding Defendant's erect penis. Defendant again instructed Carl to squeeze harder to go faster.

The mental training sessions continued throughout Carl's ninth grade year. They often involved Carl having "to suck on a lollipop . . . [to] get all the flavor out[,]" except the "lollipop" was actually Defendant's penis. Carl testified that Defendant somehow got his penis to smell and taste like strawberry, which Defendant knew was Carl's favorite flavor for candy or ice cream. After several minutes, Defendant would ejaculate and make Carl swallow it.

Carl testified these sessions often occurred in the locker room after wrestling practice, when everyone else had left; Defendant regularly drove Carl home because Defendant had instructed Carl not to tell his parents what time practice ended. The sessions also occurred at Defendant's house and in Defendant's classroom. Carl testified these

sessions occurred so frequently, that it was hard "to differentiate between [each session]. It's almost like me asking you to tell me every time you washed your hands; it used to happen so much." Carl also testified about a particular mental training session where he was "supposed to be" hypnotized, and Defendant stuck a safety pin through part of his thumb.

By the end of Carl's ninth grade year, Defendant would simply "put his hand on [Carl's] chest or put his hand on [Carl's] shoulder and [Carl] just kind of knew" it was time to do it. Defendant also started performing oral sex on Carl. During Carl's eleventh grade year, Defendant started having anal sex with Carl, including during a team trip to Cleveland, Ohio, where Defendant had anal sex with Carl "every single day[.]" Carl testified that it was very painful. During the summer between Carl's eleventh and twelfth grade years, Defendant directed Carl to also start having anal sex with him. This continued into Carl's freshman year of college, when Carl demanded that it stop. However, Defendant and Carl maintained a close relationship after that.

In 2010, Carl was involved with mixed martial arts, and he told his trainer that Defendant had sexually abused him when he was younger. The trainer spoke to a mutual friend at the mixed martial arts gym, and that friend reported it to the police. Carl met with the police shortly thereafter, although he was reluctant to incriminate Defendant. The police continued to contact Carl through the spring of 2013. Carl told Defendant "every time" he met with the police.[3]

In April 2013, Defendant asked Carl to kill him because of what he had done to Carl and because Defendant thought he would "go to hell" if he killed himself. Carl and Defendant met on the evening of 11 April 2013 and drove to a secluded park in the woods. As it began to storm, Carl choked Defendant, first using the illegal choke-out maneuver he had learned while on the East Gaston wrestling team, and then with a rope, twisted by a dowel, until Defendant's body was convulsing and face-down in the mud. However, Defendant survived and regained consciousness after Carl had left. According to testimony from Defendant's wife ("Mrs. Goins"), Defendant called her around midnight that night and "said that he thought he had been in an accident." Mrs. Goins called 911 and Defendant was taken to the hospital by ambulance. Mrs. Goins testified Defendant was " really muddy, . . . had a knot on his forehead,

3. In June 2013, several days after Defendant had been arrested, and after both Allen and Brad told Carl they had given the police statements about what had happened to them, Carl gave the police a full account of what had happened to him.

what looked like a boot print on the side of his face, and . . . a rope burn" around his neck.

D. Additional Hazing Testimony

Other former East Gaston wrestlers testified at trial and confirmed that Defendant hazed, choked-out, and gave extreme wedgies to his students. Some former wrestlers testified about a specific instance, during an overnight team lock-in at East Gaston, when Defendant instructed the upperclassmen to apply Icy-Hot muscle cream directly onto the younger wrestlers' genitals and "butt cheeks" using tongue depressors. They also testified about a team camping trip, during which, at Defendant's instruction, the upperclassmen blindfolded the three younger wrestlers on the trip, led them down a railroad track and into a cave, made the younger wrestlers strip naked, and then left, so the younger wrestlers would have to find their way back to camp alone – although their underwear were returned before they had to make their way back to camp. Defendant was present throughout.

Later that same evening, at Defendant's instruction, the upperclassmen blindfolded the younger wrestlers, pulled them from their tents, led them into the woods, and forced them to their knees. The younger wrestlers were told they would have to "suck [a] dick" and that they would be beaten if they did not comply. The younger wrestlers had to open their mouths and were forced to suck on a hot dog smeared with toothpaste. Although there were conflicting accounts, some former wrestlers, including an upperclassman who participated in the incident, testified that Defendant was the one holding the hot dog and instructing the younger wrestlers to suck on it. One of the younger wrestlers who was forced to suck on a hot dog testified that Defendant later pulled him aside and said they were subjected to this treatment because Defendant "wanted to see how dedicated [they] were to the team[.]"[4]

E. Defendant's Testimony

Defendant testified at trial that he never had any sexual contact with his students and that the hazing Allen, Brad, Carl, and other former wrestlers described at trial was generally "wrestler initiated[.]" However, Defendant did acknowledge that he would choke-out his students, give them wedgies, hit them with his ring, and engage in general

4. Another wrestler very briefly testified about another incident on that camping trip where he was told he was going to be branded on his butt cheek by a coat hanger but, at the last second, an ice cube was applied to his skin. However, he did not testify about the extent, if any, that Defendant was involved.

"horseplay[.]" He also acknowledged buying the cosmetics used in the incident where Allen and George were stripped and decorated, but he denied taking any pictures. Defendant testified he thought "hazing" was useful "to find out [which] wrestlers . . . are weak so they can be . . . culled [from the team]. Because we want the tougher wrestlers to stay in the program." Defendant further testified that he did have a policy of "what happens on trips stays on trips[,]" but the "only reason" he instituted this rule was because he did not want information about injuries, weight-classes, and other strategic information to get leaked to other teams before matches.

Defendant denied orchestrating the incidents involving younger wrestlers being forced to suck on a hot dog or Icy-Hot being applied to younger wrestlers' genitals. He denied shaving Henry with mayonnaise in front of the other wrestlers. Defendant also testified that he had stopped being so rough with his wrestlers in the mid-to-late 2000's after he had "submit[ted] to Christ." Defendant denied asking Carl to kill him and testified that he could not remember what happened on that night in April 2013 when he was taken to the hospital with a rope burn on his neck.

The jury found Defendant guilty of two counts of statutory sexual offense, six counts of taking indecent liberties with a minor, four counts of taking indecent liberties with a student, three counts of sexual activity with a student, and two counts of crimes against nature. Defendant was given an active sentence of six terms of 4 to 5 months, three terms of 10 to 12 months, six terms of 12 to 15 months, and two terms of 144 to 182 months, each to be served consecutively. Upon release, Defendant will be required to register as a sex-offender for thirty years and may be subject to satellite-based monitoring for the remainder of his natural life. Defendant appeals.

II. Defendant's Motion to Dismiss 13 CRS 57120

[1] Defendant contends the trial court erred by not granting his motion to dismiss one of his charges for crimes against nature, in which Defendant allegedly made Allen perform oral sex while pretending Defendant's penis was an ice cream cone ("the ice cream cone incident"). Specifically, Defendant claims the State failed to "present substantial evidence [at trial that] this crime occurred in North Carolina."

> This Court reviews a trial court's denial of a motion to dismiss *de novo*, wherein this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. Upon the defendant's motion, this

> Court's inquiry is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.

State v. Moore, __ N.C. App. __, __, 770 S.E.2d 131, 136 (citations and quotation marks omitted), *disc. review denied*, __ N.C. __, 776 S.E.2d 854 (2015). Moreover,

> a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury. Thus, if there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012).

In support of Defendant's contention that the State failed to produce substantial evidence that the ice cream cone incident occurred in North Carolina, Defendant provides this Court with the following excerpt between Allen and the prosecutor at trial:

> Q. And this was in your bedroom under the same situation? Do you know if this was done during one of these trainings in your bedroom? Did this happen in your bedroom during one of these mental training exercises?
>
> A. I'm not one hundred percent if this one was in my bedroom or not.
>
> Q. Where would you have been, if not?
>
> A. This one may have been at – when we were at Fargo, North Dakota, a large tournament out there.

However, not contained in Defendant's brief is the exchange that immediately followed:

Q. If you told the detective when he was first investigating this that it happened during that summer, would that have been accurate?

A. Yes.

Q. So you're saying that you remember it happening but you're having trouble placing where it happened.

(Pause)

Q. Let me back up. Did he – when this happened with the ice cream cone, was it during the summer time?

A. Yes.

Q. Was it with a candle?

A. Yes.

Q. Were you on your – I think you said you had a futon bed?

A. Yes.

Q. So would it have been in your bedroom or would it have been in – would it have been in your bedroom on the futon bed?

A. Yes. Yes.

The State also introduced a video at trial, without any limiting instruction requested by Defendant, of an interview between Allen and the police. During the interview, Allen outlined in great detail how the ice cream cone incident occurred in his bedroom in Gaston County. Accordingly, the State presented sufficient substantial evidence that this offense occurred in North Carolina. *Id.* Defendant's argument is without merit.

III. Admissibility of the Hazing Testimony

[2] Defendant challenges the admission of testimony from several former East Gaston wrestlers that Defendant utilized various "hazing" techniques against his wrestlers ("the hazing testimony"). Specifically, Defendant contends that the hazing testimony was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013), on the grounds that it "only showed . . . Defendant's propensity for aberrant behavior" and lacked "sufficient commonality" with the sexual misconduct charged. Defendant also contends that the hazing testimony was inadmissible under N.C. Gen. Stat. § 8C-1, Rule 403 (2013), on the ground that it was

unduly prejudicial. "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

As a preliminary matter, we must determine whether Defendant preserved his challenge to the hazing testimony. Defendant filed a pretrial motion to exclude evidence that Defendant hazed his wrestlers. The trial court denied Defendant's motion to the extent that the hazing testimony was admissible under Rule 404(b). However, the trial court also stated that it was "probably going to have to address [any Rule 403] concerns on a case-by-case basis." During trial, Defendant did not make contemporaneous objections to all of the hazing testimony that he contests in his brief, thereby failing to preserve those particular pieces of challenged testimony for appellate review. *See State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000) (holding that the defendant "failed to preserve [an] issue for [appellate] review" by failing to make a contemporaneous objection when the challenged evidence was presented at trial, but "elect[ing] to employ [the Court's] discretionary powers under N.C.R. App. P. 2 [to] address [the] issue."). Nonetheless, because the properly preserved portions of the challenged testimony are necessarily intertwined with the unpreserved portions, as in *Gray*, we elect to employ this Court's discretionary powers under Rule 2 of the North Carolina Rules of Appellate Procedure to fully address the challenge contained in Defendant's brief. *See id.*; N.C.R. App. P. 2[5]

A. The Hazing Testimony Under Rule 404(b)

[3] Defendant first challenges the admissibility of the hazing testimony under N.C.G.S. § 8C-1, Rule 404(b). Pursuant to this rule, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, [or] plan[.]" *Id.* Rule 404(b) evidence also may be introduced to "explain[ ] the context, motive[,] and set-up of

5. However, in the section of Defendant's brief challenging the hazing testimony, Defendant does not cite to the record, or expressly challenge, any of the testimony from the complainants, discussed *supra*, that also could be considered evidence of "hazing" by Defendant. Accordingly, any challenge Defendant may have had as to that specific testimony under N.C. Gen. Stat. §§ 8C-1, Rules 403 and 404(b) has been abandoned. *See* N.C.R. App. P. 28 ("Issues not presented and discussed in a party's brief are deemed abandoned."); *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

the crime[s], . . . [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (citation omitted). "Rule 404(b) state[s] a clear general rule of *inclusion*[.]" *Id.* at 550, 391 S.E.2d at 175 (citation omitted). It allows for the admission of evidence, "as long as it is relevant to *any fact or issue* other than the defendant's propensity to commit the crime[s]" charged. *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852–53 (1995) (emphasis added).

However, Rule 404(b) is "constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citation and quotation marks omitted).[6] The North Carolina Supreme also has warned that

> [w]hen evidence of a prior crime [or bad act] is introduced, the natural and inevitable tendency for a judge or jury is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.

State v. Carpenter, 361 N.C. 382, 387–90, 646 S.E.2d 105, 109–11 (2007) (citations and quotation marks omitted) (excluding 404(b) evidence of a past crime that "describe[d] only generic [illegal] behavior"). Accordingly, because of this "dangerous tendency . . . to mislead [the jury] and raise a legally spurious presumption of guilt," the Court has required that such evidence "be subjected to strict scrutiny by the courts." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (also excluding 404(b) evidence that described only "generic" illegal behavior).

In response to Defendant's contention that the hazing testimony "only showed . . . Defendant's propensity for aberrant behavior[,]" the State argues in its brief that the hazing testimony was admissible under Rule 404(b) because it was "highly probative" of Defendant's alleged intent, plan, or scheme to commit the crimes alleged, in that it helped explain "how [D]efendant selected his victims, why these boys submitted to [D]efendant's increasingly sexual demands, and why the [complainants] never told anyone about the abuse." The State also argues

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6. Defendant does not argue in his brief that any of the hazing testimony was inadmissible at trial for lack of temporal proximity to the crimes charged.

that this testimony explained Defendant's scheme to utilize "grooming behavior" in order to prepare his students for sexual activity.[7]

Although the State's brief focuses largely on cases from other jurisdictions holding that expert testimony of grooming behavior may be admissible at trial, our appellate courts have long recognized that lay testimony and other evidence can be admissible under Rule 404(b) to show that a defendant engaged in grooming-like behavior. In *State v. Williams*, 318 N.C. 624, 625, 350 S.E.2d 353, 354 (1986), the defendant was convicted of raping his daughter. At trial, the defendant's wife testified that the defendant had taken her and the daughter "to an x-rated movie and had told [the daughter] to look at scenes depicting graphic sexual acts." *Id.* at 626–27, 631, 350 S.E.2d at 355, 357. On appeal, the defendant challenged the admissibility of this evidence under Rule 404(b). *Id.* However, our Supreme Court held that this testimony was admissible for the purposes of Rule 404(b), because "the daughter's presence at the film at defendant's insistence, and his comments to her[,] show his preparation and plan to engage in sexual intercourse with her and assist in that preparation and plan by making her aware of such sexual conduct and arousing her." *Id.* at 632, 350 S.E.2d at 538.

Similarly, in *State v. Brown*, 178 N.C. App. 189, 193, 631 S.E.2d 49, 52 (2006), the complainant, a young girl, testified, *inter alia*, that the defendant showed her pornographic photos, leading up to the time he began molesting and raping her. The trial court allowed the State to introduce those photos into evidence at trial. *Id.* On appeal, the defendant raised a 404(b) challenge to the admission of the photos but not to any of the complainant's testimony. *Id.* at 191, 631 S.E.2d at 51. Nonetheless, this Court held that the photos were admissible because they "served to corroborate [the complainant's] testimony of [the] defendant's actions and provided evidence of [the defendant's] plan and preparation to engage in sexual activities with [the complainant]." *Id.* at 193–94, 631 S.E.2d at 52–53.

The present case is distinguishable from *Williams* and *Brown*, to the extent that the hazing techniques utilized by Defendant were – to

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7. Generally, "[g]rooming refers to deliberate actions taken by a defendant to . . . form[ ] . . . an emotional connection with the child and . . . reduc[e] . . . the child's inhibitions in order to prepare the child for sexual activity." *See United States v. Chambers*, 642 F.3d 588, 593 (7th Cir. 2011). Grooming behavior may include "gift-giving, isolating the victim from his guardians, and activity designed to desensitize the victim to sexual advances, *e.g.*, touching in an innocuous manner and thereafter escalating the sexual nature of the touches." *United States v. Hitt*, 473 F.3d 146, 152 (5th Cir. 2006).

varying degrees – not overtly sexual or pornographic. Nonetheless, our Court also has held that, when a defendant is charged with a sex crime, 404(b) evidence presented at trial does not necessarily need to be limited to other instances of sexual misconduct.

In *State v. Strickland*, 153 N.C. App. 581, 584, 570 S.E.2d 898, 901 (2002), the defendant was charged with raping his ex-wife. The ex-wife testified at trial that she "suffered physical abuse throughout her marriage to [the] defendant," which ended a year before the alleged rape occurred. *Id.* at 590, 570 S.E.2d at 904. On appeal, the Defendant challenged the admissibility of this testimony under Rule 404(b), on the ground that "the evidence of previous abuse was not a sufficiently similar act" to the crime charged. *Id.* at 589, 570 S.E.2d at 904. However, this Court held that the ex-wife's testimony was admissible under Rule 404(b), in part, because,

> [*w*]*hether sexual in nature or not*, [the] defendant had a history of attacking [the complainant] and asserting his physical power over her. The evidence of defendant's prior abuse of [the complainant] was relevant to prove his *pattern of physical intimidation* of [the complainant].

Id. at 590, 570 S.E.2d at 904–05 (emphasis added).

The present case also is distinguishable from *Williams* and *Brown*, in that the challenged hazing techniques testified to at trial were used on people other than the complainants. However, our appellate courts also have allowed the introduction of 404(b) evidence involving prior bad acts committed against people other than the purported victims in order to establish a common scheme or to provide necessary context to explain how the alleged crimes occurred.

In *State v. Paddock*, 204 N.C. App. 280, 281, 696 S.E.2d 529, 530 (2010), the defendant was charged with felonious child abuse inflicting serious bodily injury and felony murder, arising out of the death of her three-year-old son. Although the defendant was not charged with abusing her six surviving children, the trial court admitted 404(b) testimony from the surviving children that the defendant had engaged in a "pattern of abuse" against the surviving children, in which she "sought to control their behavior with daily routines and a pattern of corporal punishment that became more severe [over time] . . . and escalated significantly in the months prior to [the three-year-old's] death." *Id.* at 285–86, 696 S.E.2d at 533. Although not all of that alleged mistreatment was necessarily life-threatening, on appeal, this Court held that the trial court did not err by admitting the 404(b) testimony from the surviving children

on the grounds that it was used to show the "defendant's intent, plan, scheme, system or design to inflict cruel suffering, as well as malice and lack of accident" with respect to the crimes charged. *Id.* at 286, 696 S.E.2d at 533–34.

In the present case, the hazing testimony tended to show that Defendant exerted great physical and psychological power over his students, singled out smaller and younger wrestlers for particularly harsh treatment, and subjected them to degrading and often quasi-sexual situations. "Whether sexual in nature or not," *Strickland*, 153 N.C. App. at 590, 570 S.E.2d at 904, and regardless of whether some wrestlers allegedly were not victimized to the same extent as the complainants, *see Paddock*, 204 N.C. App. at 285–86, 696 S.E.2d at 533, the hazing testimony had probative value beyond the question of whether Defendant had a "propensity for aberrant behavior." *See White*, 340 N.C. at 284, 457 S.E.2d at 852–53.

Moreover, we are unpersuaded by Defendant's remaining argument that the hazing testimony was inadmissible under Rule 404(b) simply because the alleged crimes occurred "when the [complainants were] alone with" Defendant, while most of the alleged hazing occurred in a group setting. Instead, the hazing testimony was introduced to show a specific intent, plan, or scheme by Defendant to create an environment within the East Gaston wrestling program that allowed Defendant to target particular students, groom them for sexual contact, and secure their silence.

Accordingly, the present case also is distinguishable from *Carpenter* and *Al-Bayyinah*, in that the 404(b) testimony did not describe behavior that was "generic" to the crimes charged against Defendant. Even accounting for the admonitions in *Carpenter*, 361 N.C. at 387–88, 646 S.E.2d at 109–10, and *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 122, that courts should be cautious in admitting evidence of other crimes or bad acts, the hazing testimony fell within the permissible bounds of Rule 404(b). *See Williams*, 318 N.C. at 632, 350 S.E.2d at 358; *Paddock*, 204 N.C. App. at 285–86, 696 S.E.2d at 533–34; *Brown*, 178 N.C. App. at 193–94, 631 S.E.2d at 52–53; *Strickland*, 153 N.C. App. at 590, 570 S.E.2d at 904–05. Therefore, the trial court did not err by admitting the hazing testimony under Rule 404(b).

B. The Hazing Testimony Under Rule 403

[4] Defendant next challenges the admissibility of the hazing testimony under N.C.G.S. § 8C-1, Rule 403. Pursuant to Rule 403, evidence that is otherwise admissible "may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

Defendant's challenge to the hazing testimony under Rule 403 primarily rests on the assertion in his brief that the present case is similar to *State v. Simpson*, 297 N.C. 399, 255 S.E.2d 147 (1979). In *Simpson*, the defendant was tried for murder, burglary, robbery, and larceny. *Id.* at 400, 255 S.E.2d at 148–49. The defendant confessed to those crimes during a police interrogation. *Id.* at 406–07, 255 S.E.2d at 152. He also confessed to the police, *inter alia*, of "having committed sodomy with a dog[.]" *Id.* at 407, 255 S.E.2d at 152. At trial, "[a]fter the State introduced evidence that defendant had confessed to sodomy with a dog[,] it spent a large part of the trial proving that defendant did, indeed, commit sodomy with a dog." *Id.* at 407, 255 S.E.2d at 152–53. On appeal, our Supreme Court granted the defendant a new trial because the question of whether the defendant committed sodomy with a dog was "totally irrelevant" to the crimes charged and the State's persistent focus on this issue at trial unduly prejudiced the defendant. *Id.* at 407–08, 255 S.E.2d at 153. Accordingly, in the present case, Defendant argues that the hazing testimony resulted in "mini trials of irrelevant and collateral evidence" that were unrelated to the issue of Defendant's guilt of the crimes charged.

We are unpersuaded. As discussed *supra*, the hazing testimony was highly probative of Defendant's intent, plan, or scheme to carry out the crimes charged against him. Although the State did spend a measurable portion of trial eliciting testimony from witnesses on these hazing techniques, we do not believe this is necessarily conclusive of Defendant's challenge.[8] Defendant was charged with numerous crimes that occurred over the span of almost a decade, a time during which many students came and went from the East Gaston wrestling program. Defendant's use of hazing techniques appears to have continued throughout that

8. Defendant challenges the testimony of certain wrestlers during the State's case-in-chief, whose testimony spans slightly more than two hundred pages of trial transcript. Excluding conversations held outside the presence of the jury, procedural and housekeeping discussions, and testimony on other matters, but including cross-examination of the State's witnesses, the hazing testimony from other wrestlers that is challenged in Defendant's brief makes up about seventy pages of trial transcript. To put this in context, the State's case-in-chief is covered in more than one thousand pages of trial transcript. Defendant's case-in-chief makes up more than nine hundred pages of trial transcript. Yet, Defendant directs this Court to a total of six pages therein in which he claims to have spent time refuting the challenged hazing testimony.

time. It was reasonably necessary for the State to show that Defendant's conduct was ongoing and pervasive in order to explain how each complainant fell prey to Defendant and how these alleged crimes continued unabated for so long. *Accord State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) ("When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan."). Therefore, the State's elicitation of the hazing testimony at trial was not excessive. We also do not believe it derailed Defendant's trial from the overall focus of establishing whether the crimes for which he was charged actually occurred.

It is conceivable, however, that the State eventually could have run afoul of Rule 403 had it continued to spend more time at trial on the hazing testimony, or had it elicited a similar amount of 404(b) testimony on ancillary, prejudicial matters that had little or no probative value regarding Defendant's guilt. *See State v. Hembree*, 367 N.C. 2, 14–16, 770 S.E.2d 77, 86–87 (2015) (granting the defendant a new trial, in part, because the trial court "allow[ed] the admission of an excessive amount" of 404(b) evidence regarding "a victim for whose murder the accused was not currently being tried"); *accord Simpson*, 297 N.C. at 407–08, 255 S.E.2d at 153. However, that is not the case here. Accordingly, the trial court did not abuse its discretion under Rule 403 by admitting the hazing testimony that was presented at trial.

IV. Exclusion of Evidence of Bias by Brad

Defendant challenges the trial court's refusal "to allow defense counsel to cross-examine [Brad] about statements he allegedly made to police and his wife that he was addicted to porn[,] . . . [had] an extramarital affair[,] and that he could not control his behavior because of what [Defendant] did to him[,]" ("the bias evidence"). Specifically, Defendant contends the trial court erred by prohibiting him from introducing the bias evidence because it would have shown Brad had a reason to fabricate allegations against Defendant – both to mitigate things with his wife and to save his military career, as adultery is a court-martialable offense.

At trial, the State preemptively moved to exclude the bias evidence before calling Brad as a witness for the State. After hearing arguments from both the State and Defendant, the trial court excluded the bias evidence on the grounds that: (1) it was not relevant, per N.C. Gen. Stat. § 8C-1, Rule 401 (2013); (2) it was rendered inadmissible under North Carolina's Rape Shield Statute, per N.C. Gen. Stat. § 8C-1, Rule 412 (2013) ("the Rape Shield Statute"); and (3) any probative value this evidence might have had was substantially outweighed by the danger of

unfair prejudice, per N.C.G.S. § 8C-1, Rule 403. Defendant contends the trial court erred in its decision. We agree.

A. The Bias Evidence Under Rules 401 and 412

[5] Defendant first challenges the trial court's decision to exclude the bias evidence because it was irrelevant under N.C.G.S. § 8C-1, Rule 401, and was rendered inadmissible by the Rape Shield Statute, N.C.G.S. § 8C-1, Rule 412. N.C.G.S. § 8C-1, Rule 401 defines "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." North Carolina's Rape Shield Statute provides that

> [n]otwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C.G.S. § 8C-1, Rule 412(b).[9]

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9. N.C.G.S. § 8C-1, Rule 412(d) also provides that

> [b]efore any questions pertaining to [the sexual history of a witness] are asked[,] . . . the proponent of such evidence shall first apply to the court for a determination of the relevance of the [evidence.] . . . When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the

The State primarily argues in its brief – and Defendant does not dispute – that the bias evidence does not fit within one of the prongs of Rule 412(b). The State contends that this rendered the bias evidence inadmissible. In response, Defendant directs this Court to *State v. Martin*, __ N.C. App. __, 774 S.E.2d 330, *disc. review denied*, __ N.C. __, 775 S.E.2d 844 (2015). In *Martin*, the defendant, a high school substitute teacher, was accused of sexually assaulting a female student. *Id.* at __, 774 S.E.2d at 331. The student testified that the defendant walked into the boy's locker room, saw that she was hanging out with two football players, told the boys to leave, and then demanded that she perform oral sex on him. *Id.* at __, 774 S.E.2d at 331–32. At trial, the defendant sought to introduce testimony from himself and two other witnesses that the student was performing oral sex on the football players when the defendant entered the locker room. *Id.* at __, 774 S.E.2d at 332. The defendant contended that this evidence was necessary to show that the student had a reason to fabricate her accusations against the defendant, to cover up her true actions. *Id.* However, after the defendant's counsel made an offer of proof concerning this evidence, "the trial court ruled that the evidence was *per se* irrelevant because the evidence did not fit under any of the four exceptions provided in our Rape Shield Statute[.]" *Id.*

On appeal, this Court noted that

> [o]ur Supreme Court has expressly held that the four exceptions set forth in the Rape Shield Statute do not provide "the sole gauge for determining whether evidence is admissible in rape cases." *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982). As our Supreme Court has explained, the Rape Shield Statute "define[s] those times when [other] sexual behavior of the complainant is relevant to issues raised in a rape trial and [*is*] *not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes.*" *State v. Fortney*, 301 N.C. 31, 42, 269 S.E.2d 110, 116 (1980) (emphasis added). That is, "the [Rape Shield Statute] was not intended to act as a barricade against evidence which is used to prove

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extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence.

The State contends in its brief that Defendant "failed to make any offer of proof" for the bias evidence at trial, as required by Rule 412(d). However, right before the charge conference at trial, the trial court expressly allowed Defendant to make an offer of proof on this matter.

> issues *common to all trials*." *Younger*, 306 N.C. at 697, 295 S.E.2d at 456 (emphasis added). More recently, our Court has held that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute. *See State v. Edmonds*, 212 N.C. App. 575, 580, 713 S.E.2d 111, 116 (2011) (noting that "[t]he lack of a specific basis under [the Rape Shield Statute] for admission of evidence does not end our analysis")[.] . . .
>
> Where the State's case in *any* criminal trial is based largely on the credibility of a prosecuting witness, evidence tending to show that the witness had a motive to falsely accuse the defendant is certainly relevant. The motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault.
>
> [Accordingly,] [t]he trial court erred by concluding that the evidence was inadmissible *per se* because it did not fall within one of the four categories in the Rape Shield Statute.

Id. at __, 774 S.E.2d at 335–36 (footnote omitted).

With respect to N.C.G.S. §§ 801-C, Rules 401 and 412, the present case is indistinguishable from *Martin* in any meaningful way. The State's case for the charges involving Brad was "based largely on the credibility of [Brad as] a prosecuting witness[.]" *Martin*, ___ N.C. App. at ___, 774 S.E.2d at 336. Defendant sought to introduce "evidence tending to show that [Brad] had a motive to falsely accuse" Defendant. *See id.* Although, unlike in *Martin*, Defendant sought to introduce the bias evidence during cross-examination of a prosecuting witness, see id. at __, 774 S.E.2d at 334 (distinguishing *Martin* from *State v. Black*, 111 N.C. App. 284, 432 S.E.2d 710 (1993), in part, because the defendant in *Martin* did not seek to introduce bias evidence during cross-examination of the complainant), the present case is also distinguishable from *Black* because Defendant did not seek to cross-examine a prosecuting witness about his or her general sexual history. *Cf. Black*, 111 N.C. App. at 289–90, 432 S.E.2d at 714. Instead, Defendant had identified specific pieces of evidence that could show Brad had a reason to fabricate his allegations against Defendant. *Accord Olden v. Kentucky*, 488 U.S. 227, 232–33, 102 L. Ed. 2d 513, 519–21 (1988) (per curiam) (holding that the defendant, on cross-examination, must be allowed to introduce evidence of the

complainant's relationship with her boyfriend, in order to challenge the credibility of her allegations of rape against the defendant).

The bias evidence was "certainly relevant" under N.C.G.S. § 801-C, Rule 401. *See id.* at __, 774 S.E.2d at 335–36; *see also Younger*, 306 N.C. at 697, 295 S.E.2d at 456 ("In this case, as in most sex offense cases, the prosecuting witness' testimony is crucial to the State's evidence and [his or] her credibility as a witness can easily determine the outcome at trial."). It also was not barred by N.C.G.S. § 801-C, Rule 412. *See Martin*, __ N.C. App. at __, 774 S.E.2d at 335–36; *see also State v. Thompson*, 139 N.C. App. 299, 309, 533 S.E.2d 834, 841 (2000) ("The [R]ape [S]hield [S]tatute . . . does not apply to false accusations[.]"). Therefore, the trial court erred by excluding the bias evidence under N.C.G.S. §§ 801-C, Rules 401 and 412.

B. The Bias Evidence Under Rule 403

[6] However, as discussed *supra*, N.C.G.S. § 8C-1, Rule 403 provides that otherwise admissible evidence still "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990) (citation omitted). Defendant contends the trial court abused its discretion by excluding the bias evidence under Rule 403. We agree.

"[A] trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant[.]" *Olden*, 488 U.S. at 232, 102 L. Ed. 2d at 520 (citation and quotation marks omitted). However, "[t]he right of confrontation is an absolute right rather than a privilege, and it must be afforded an accused not only in form but in substance." *State v. Watson*, 281 N.C. 221, 230, 188 S.E.2d 289, 294 (1972). Although

> the trial court has broad discretion in determining whether to admit or exclude evidence, and we are sympathetic to the trial court's legitimate worry that [certain] evidence could complicate the case [before it,] . . . we have long held that "[c]ross-examination of an opposing witness for the purpose of showing . . . bias or interest is a substantial

> legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party."

State v. Lewis, 365 N.C. 488, 496–97, 724 S.E.2d 492, 498–99 (2012) (quoting *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 903 (1954)) (holding the trial court abused its discretion by excluding bias evidence that the lead investigating detective had tampered with the jury in the defendant's previous trial).

The rules discussed above are well-established. However, our Courts have rarely had to resolve the ultimate question of whether a trial court abused its discretion under Rule 403 by excluding otherwise admissible evidence pertaining to the sexual conduct of a prosecuting witness. *See*, *e.g.*, *Younger*, 306 N.C. at 697–98, 295 S.E.2d at 456–67 (holding that evidence of other sexual conduct to establish bias was not rendered inadmissible by the Rape Shield Statute, but not asked to resolve whether the probative value of this evidence was substantially outweighed by its prejudicial effect); *State v. Rorie*, __ N.C. App. __, __, 776 S.E.2d 338, 345 (same), *allowing temporary stay* __ N.C. __, 776 S.E.2d 512 (2015); *Martin*, __ N.C. App. at __, 774 S.E.2d at 336 (same).

In *Edmonds*, 212 N.C. App. at 576, 713 S.E.2d at 113, the defendant was accused of raping a fifteen-year-old girl. After the alleged assault, the complainant allegedly gave inconsistent statements about her general sexual history to the police and medical personnel. *Id.* at 579, 713 S.E.2d at 115. The defendant sought to introduce these inconsistent statements to attack the complainant's credibility. *Id.* The trial court denied admission of this evidence under the Rape Shield Statute. *Id.*

This Court held that evidence of the complainant's inconsistent statements regarding her sexual history was not rendered inadmissible by the Rape Shield Statute, but it was properly excluded, in part, because it "bore no direct relationship to the incident in question[.]" *Id.* at 581, 713 S.E.2d at 116. "In essence, [the] defendant asked the trial court to do what our Supreme Court said it should not in *Younger*, to admit 'some distant sexual encounter which has no relevance to this case other than showing [that] the witness [was] sexually active.' " *Id.* at 581–82, 713 S.E.2d at 117 (quoting *Younger*, 306 N.C. at 696, 295 S.E.2d at 456).[10]

The present case is distinguishable from *Edmonds*. Defendant did not seek to discredit Brad generally by introducing evidence of

10. The Court in *Edmonds* did not consider the possibility of Constitutional error by the trial court because the defendant did not preserve that issue for appeal. *Id.* at 577–78, 713 S.E.2d at 114.

completely unrelated sexual conduct at trial. Instead, Defendant sought to introduce specific evidence that Brad told "police and his wife that he was addicted to porn . . . [and had] an extramarital affair[,] . . . [in part] because of what [Defendant] did to him." Defendant wanted to show that those statements revealed Brad had a reason to fabricate his allegations against Defendant – to mitigate things with his wife and protect his military career. Unlike *Edmonds*, the bias evidence that Defendant sought to introduce addressed a direct, "causative link between the proposed impeachment and the incident[s] in question" and emanated from two potentially strong sources of bias. *See id* at 581, 713 S.E.2d at 116; *accord Younger*, 306 N.C. at 698, 295 S.E.2d at 456 (noting that prior sexual conduct by a witness may have "low probative value and high prejudicial effect[,]" "absent some factor which ties it to the specific act which is the subject of the trial"). "While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, . . . the limitation here was beyond reason." *Olden*, 488 U.S. at 232–33, 102 L. Ed. 2d at 519–21 (per curiam) (citation and quotation marks omitted) (holding that the trial court erred by refusing to allow the defendant to cross-examine the complainant about whether she fabricated rape allegations against the defendant in order to preserve her relationship with her boyfriend). Therefore, the trial court abused its discretion by excluding the bias evidence under N.C.G.S. § 801-C, Rule 403.[11]

C. Prejudice

However, this Court must also determine whether the trial court's error unduly prejudiced Defendant, thereby warranting a new trial on the charges involving Brad. *See Lewis*, 365 N.C. at 497, 724 S.E.2d at 499 (holding that, after it is determined "the trial court erred by excluding [bias] evidence[,] . . . [the Court] must determine whether the [trial]

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11. We reiterate what this Court said in *Martin*:

> In these situations, a trial judge should strive to fashion a compromise. For example, where a defendant claims that the prosecuting witness is falsely accusing him of rape rather than admitting to her boyfriend that her encounter was consensual, the trial court may allow the defendant to introduce evidence of the prosecuting witness' dating relationship with her boyfriend without introducing details of their sexual relationship.

Martin, __ N.C. App. at __ n.6, 774 S.E.2d at 336 n.6 (citing *Olden*, 488 U.S. 227, 102 L. Ed. 2d 513). Similarly, in the present case, the trial court could have allowed Defendant to introduce general statements Brad made that he had a "porn addiction" and had engaged in a marital infidelity, while also prohibiting Defendant from introducing irrelevant and needlessly prejudicial details regarding the specifics of those matters.

court's error was prejudicial to [the] defendant"). Regarding the trial court's error in excluding the bias evidence under N.C.G.S. §§ 801-C, Rules 401, 403, and 412, Defendant would be prejudiced only if "there is a *reasonable* possibility that, had the error[s] in question not been committed, a different result *would have been reached* at the trial[.]" N.C. Gen. Stat. § 15A-1443(a) (2013) (emphasis added) (regarding prejudice for "errors relating to rights arising other than under the Constitution of the United States"). "The burden of showing such prejudice . . . is upon the defendant." *Id.*

In the present case, "the evidence of [D]efendant's guilt is strong[.]" *See Lewis*, 365 N.C. at 497, 724 S.E.2d at 499. Defendant was on trial for numerous sex offenses that occurred over the span of almost a decade, and all of the complainants testified in great detail about repeated instances of abuse by Defendant. The testimony from Allen, Brad, and Carl regarding this abuse was strikingly similar. Moreover, the unchallenged testimony by the complainants that Defendant engaged in hazing and grooming-like behaviors was largely corroborated by the other former East Gaston wrestlers who testified at trial.

Although the "strength [of the evidence against Defendant] is counterbalanced," *id.*, by Brad having possible sources of bias and the fact that the present case rested largely on the credibility of the complainants and Defendant, "[g]iven the overwhelming evidence against [D]efendant" that was presented at trial, *State v. Young*, 195 N.C. App. 107, 111, 671 S.E.2d 372, 375 (2009), Defendant has failed to carry his burden under N.C.G.S. § 15A-1443(a) to show "there is a reasonable possibility that . . . a different result would have been reached at the trial" if the trial court had not erred by excluding the bias evidence. *But cf. Lewis*, 365 N.C. at 497, 724 S.E.2d at 499 (finding prejudice under N.C.G.S. § 15A-1443(a) where the defendant was being retried for a single instance of breaking and entering, robbery, and sexual assault, the lead detective in the defendant's case had shown bias throughout the investigation – and had even tampered with the jury during the defendant's first trial – and the defendant was prohibited from fully cross-examining the detective on retrial). Therefore, any error by the trial court under N.C.G.S. §§ 801-C, Rules 401, 403, and 412 did not unduly prejudice Defendant, per N.C.G.S. § 15A-1443(a).

Moreover, Defendant's brief does not provide this Court with an analogous argument that, by prohibiting Defendant from cross-examining Brad about the bias evidence at trial, the trial court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution – where, if found, the violation would have

been "prejudicial *unless*" the State established "it was harmless *beyond a reasonable doubt*." N.C. Gen. Stat. § 15A-1443(b) (2013) (emphasis added) (regarding prejudice for "violation[s] of [a] defendant's rights under the Constitution of the United States"). Defendant has abandoned that argument on appeal. *See* N.C.R. App. P. 28; *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. Accordingly, we find no prejudicial error by the trial court.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
LAWRENCE KEITH McGEE

No. COA15-722

Filed 15 December 2015

Appeal and Error—denial of motion for appropriate relief—petition for writ of certiorari—swapping horses on appeal—argument barred by statute

Where the Court of Appeals granted defendant's petition for writ of certiorari to review the trial court's denial of his Motion for Appropriate Relief (MAR) filed seven years after he pled guilty to eighteen felonies, the State's motion to dismiss was allowed. Defendant's brief failed to make any of the arguments set forth in his petition. Further, defendant's argument in his brief—that the trial court erred in denying his MAR because the sentencing court violated the procedural requirements of N.C.G.S. §§ 15A-1023(b) and/or 15A-1024 in accepting his guilty plea—was barred by N.C.G.S. § 15A-1027, which requires that such a procedural argument be made during the appeal period and not through a collateral attack after the appeal period has expired.

Appeal by defendant by writ of certiorari from order entered 8 July 2014 by L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 19 November 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

TYSON, Judge.

Lawrence Keith McGee's ("Defendant") petition for a writ of certiorari from the trial court's denial of his motion for appropriate relief ("MAR") was allowed. Defendant's argument he now asserts was not set forth in his petition and cannot be reviewed within the scope allowed by this Court's 27 August 2014 order issuing the writ of certiorari. We dismiss Defendant's writ.

I. Background

On 12 May 2008, Defendant appeared in Forsyth County Superior Court and pleaded guilty to eighteen felonies: (1) six counts of breaking and entering; (2) three counts of larceny after breaking and entering; (3) two counts of driving while intoxicated ("DWI"); (4) one count of attempted breaking and entering a building; (5) one count of attempted larceny; (6) one count of possession of stolen goods or property; (7) one count of possession of burglary tools; (8) one count of eluding arrest; (9) one count of driving while license revoked ("DWLR"); and (10) one count of eluding arrest with two aggravating factors. Defendant also pleaded guilty to two counts of attaining the status of a habitual felon. The charges, which resulted from five separate incidents, were consolidated by the court for judgment.

At the plea hearing, the trial court conducted a colloquy with Defendant pursuant to N.C. Gen. Stat. § 15A-1022. Defendant stated his attorney had explained all of the charges to him. Defendant also acknowledged he understood how his habitual felon status charges affected sentencing in each of the predicate felonies to which they applied. The Court informed Defendant of the mandatory minimum and the possible maximum punishment for each of the charged offenses.

Under the plea arrangement, fifteen of the eighteen charges, with the exception of the two DWI charges and the DWLR charge, were consolidated for judgment. Defendant was to be sentenced at the minimum of the presumptive range as a habitual felon for those charges. The two DWI and single DWLR charges were to be consolidated and the sentence imposed would run consecutively with the other sentence.

After listening to the State's factual basis for the plea, Judge William Z. Wood expressed reservations with the plea arrangement, and stated

he was "not sure eight years is enough" for the number and seriousness of the offenses charged. In response, the prosecutor pointed out the presumptive range for Defendant's sentence under the plea arrangement would be a minimum of 135 months imprisonment. Judge Wood responded "Okay. Thank you. I can stand that. Okay."

After considering the plea and conducting a colloquy with one of Defendant's victims in open court, the following conversation took place between the court, Defendant's counsel, and Defendant:

> THE COURT: . . . well, if you-all want to go to the top of the presumptive, I'll do that. That's 168 to 211. If you need a little while to talk about it, that's fine.
>
> [Defendant's counsel]: Your Honor, there's nothing I can talk to my client about. He's sat here and heard everything. It's his decision. If he wants more time to think about it –
>
> THE COURT: I know. If he needs a minute to think about it. It's his life. I'm not going to – one way or the other.
>
> THE DEFENDANT: I would like to have time to talk to my wife about it, if that's okay.
>
> THE COURT: Sure. Where is she?
>
> THE DEFENDANT: I'll have to -- she'll come visit me in jail tonight.
>
> THE COURT: No. I won't be here tomorrow.
>
> THE DEFENDANT: Oh. I guess I ain't (sic) got much choice.
>
> THE COURT: No. You got a choice. If you want to think about it a minute, we'll do the next case and then come back to it. I think that's fair.

Following this colloquy, the Court took a six-minute recess during which Defendant and his counsel discussed the new plea offer. After recess, Defendant agreed to the new plea offer and signed the modification.

The modification to Defendant's plea arrangement states: "Defendant agrees to the modifying (sic) the agreement to sentence the Defendant on the top of the presumptive range as a habitual felon." Consistent with the modification to the plea arrangement and as announced during the later colloquy with Defendant, the trial court sentenced Defendant to a

minimum of 168 months and a maximum of 211 months imprisonment. Defendant failed to pursue a direct appeal.

Over seven years later on 28 March 2014, Defendant filed an MAR in the Forsyth County Superior Court. On 8 July 2014, the court denied Defendant's MAR. On 11 August 2014, Defendant filed a Petition for Writ of Certiorari with this Court.

On 27 August 2014, this Court allowed Defendant's petition, "to permit appellate review" of the trial court's denial of Defendant's MAR. This Court's order specifically states: "The scope of the appeal shall be limited to the issues raised in petitioner's 28 March 2014 motion for appropriate relief."

II. Issue

Defendant argues the trial court erred in denying his MAR. He asserts his MAR should have been granted, because the trial court failed to follow the procedural requirements mandated by N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 (2013) in accepting his guilty plea.

III. Motion to Dismiss

The State filed a motion to dismiss this appeal. The motion asserts Defendant's arguments are inconsistent with; fall outside of; and, are not limited to the scope of review permitted by this Court's 27 August 2014 order allowing the petition for writ of certiorari.

A. Analysis

This Court's 27 August 2014 order limited the scope of appellate review to "the issues raised in [Defendant's] 28 March 2014 [MAR]." In his brief, Defendant argues the trial court erred in denying his MAR because the sentencing court violated the procedural requirements of N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 in accepting his guilty plea. The State contends these arguments are not "issues raised" in Defendant's 28 March 2014 MAR. We agree.

1. Defendant's MAR

Defendant made various claims in his 28 March 2014 MAR. Among them, and as relevant here, Defendant alleged:

> 6. That N.C. Gen. Stat. § 15A-1023(b) states, "Upon rejection of the plea arrangement by the judge, the defendant is entitled to a continuance until the next session of court." Moreover N.C. Gen. Stat. §15A-1024 states that, "If at the

> time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court."
>
> 7. At no time during the sentencing hearing did the Hon. William Z. Wood, Jr. inform [Defendant] of his right to a continuance until the next session of court. Instead, when asked by [Defendant] for at least a day to think over the new plea the Hon William Z. Wood, Jr. stated, "No. I won't be here tomorrow.". . . [Defendant] in response stated, "Oh. I guess I ain't (sic) got much choice".

Allegation 10 in Defendant's MAR is a verbatim recitation of allegation 7, but omits the last sentence. Based upon these, and other, factual allegations, Defendant's MAR claimed his plea was unconstitutional because: (1) it was not knowing, voluntary and intelligent; and (2) he received ineffective assistance of counsel because his trial counsel failed to inform him of his right to a continuance. Defendant also claimed his prior record level was incorrectly assessed.

Defendant claims the above quoted factual allegations asserted in his MAR raises the question of whether the trial court violated N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 is an "issue presented" by his MAR, and places it within the scope of review permitted by this Court's 27 August 2014 order. The General Statutes and this Court's precedents foreclose such an interpretation of that order.

2. Violation of N.C. Gen. Stat. §§ 15A-1023(b) or 15A-1024

N.C. Gen. Stat. §§ 15A-1023 and 15A-1024 are codified within Article 58 of Chapter 15A of the General Statutes. Article 58 is entitled "Procedures Relating to Guilty Pleas in Superior Court." N.C. Gen. Stat. § 15A-1027, another statute located in Article 58 of Chapter 15A, is entitled "Limitation on collateral attack on conviction," and provides: "Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired." N.C. Gen. Stat. § 15A-1027 (2013).

Pursuant to N.C. Gen. Stat. § 15A-1027, the trial court's alleged noncompliance with N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 may not be a basis for review of Defendant's sentence after "the appeal period" has expired. *See State v. Rhodes*, 163 N.C. App. 191, 194, 592 S.E.2d 731,

733 (2004) (noting N.C. Gen. Stat. § 15A-1027 "expresses the General Assembly's intent to permit review of procedural violations only during 'the appeal period.' "). Our Supreme Court has stated that a MAR is a collateral attack on a conviction. *See State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) (citations omitted) (noting "[a] motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief").

In this case, Defendant pleaded guilty on 12 May 2008. Pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure, Defendant was permitted fourteen days from the entry of judgment to file a direct appeal or a motion for appropriate relief to be considered filed during the appeal period:

> (a) *Manner and time.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by
>
> (1) giving oral notice of appeal at trial, or
>
> (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the 14-day period following entry of the judgment or order.

N.C. R. App. P. 4(a) (2008). The "appeal period" in Defendant's case expired on or about 27 May 2008. Defendant is barred by statute and precedents from collaterally attacking the judgment entered on the basis of alleged noncompliance with the procedural rules set forth in Article 58 of Chapter 15A of the General Statutes. N.C. Gen. Stat. § 15A-1027. This Article includes both N.C. Gen. Stat. §§ 15A-1023 and 15A-1024.

This reading of N.C. R. App. P. 4 and the phrase "the appeal period" is reinforced by this Court's holding in *State v. Webber*, 190 N.C. App. 649, 660 S.E.2d 621 (2008). In *Webber*, the defendant was found guilty of various offenses on 26 and 30 January 2006. *Id.* at 650, 660 S.E.2d at 621. On 8 February 2006, defendant filed a MAR alleging juror misconduct. *Id.* at 650, 660 S.E.2d at 622. On 19 February 2007, "[o]ver a year later," defendant's MAR was called for a hearing. *Id.* At the hearing, defendant "withdrew his MAR, having been unable to substantiate any juror misconduct, and orally entered notice of appeal." *Id.*

Citing to N.C. R. App. P. 4(a), the Court in *Webber* found it lacked jurisdiction. *Id.* The Court noted defendant failed to give oral notice of appeal within fourteen days of conviction, and failed to give a written notice of appeal within the allowed fourteen-day window. *Id.* at 651, 660 S.E.2d at 622. The Court also found that there was no ruling entered on defendant's MAR, notwithstanding whether it was filed within 14 days of entry of judgment. *Id.* The Court concluded: "Defendant's oral notice of appeal after withdrawal of his MAR was given on 19 February 2007, more than one year after the fourteen[-]day appeal period had ended." *Id.*

In this case, Defendant's MAR was filed more than seven years after the 14 day appeal period allowed by N.C. R. App. P. 4. Since the MAR was filed outside the appeal period, it is a collateral attack, and Defendant's argument is barred by N.C. Gen. Stat. § 15A-1027.

This Court's 27 August 2014 order allowing Defendant's petition, over seven years after sentence was imposed, did not include the question of whether the trial court violated N.C. Gen. Stat. §§ 15A-1023(b) and/or 15A-1024 to be properly before this Court through certiorari review. Reading this Court's 27 August 2014 order to allow review of alleged procedural violations during Defendant's plea hearing would contravene both N.C. Gen. Stat. § 15A-1027 and our precedent in *Rhodes*. Both the statute and *Rhodes* makes it pellucidly clear that an alleged violation of a procedural rule found in Article 58 of Chapter 15A of the General Statutes may only be mounted during "the appeal period," and not through a collateral attack after such period expired. N.C. Gen. Stat. § 15A-1027 ("Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired"); *Rhodes*, 163 N.C. App. at 194, 592 S.E.2d at 733. The law "does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

3. Statutory Right of Continuance

Our holding does not diminish a trial court's duty, pursuant to N.C. Gen. Stat. §§ 15A-1023 and 15A-1024, to grant a continuance until the next session of court, following the rejection by the trial court of a guilty plea or the imposition of a sentence other than provided for in a plea arrangement. N.C. Gen. Stat. § 15A-1023(b) ("Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court."); N.C. Gen. Stat. § 15A-1024 ("Upon withdrawal [of a guilty plea], the defendant is entitled to a continuance until the next session of court."). Nor does this holding diminish a

defendant's ability to pursue appellate review, in open court or during "the appeal period," of the trial court's alleged violations of the procedural requirements found in Article 58 of Chapter 15A of the General Statutes.

IV. Conclusion

Defendant failed to assert any permissible argument in his brief on appeal, which was allowed by this Court's 27 August 2014 order granting a writ of certiorari. Defendant made no argument in his brief to this Court regarding (1) ineffective assistance of trial counsel; (2) constitutional violations regarding the knowing, voluntary, or intelligent nature of his plea; or (3) prior record level assessment. We deem those arguments abandoned. N.C. R. App. P. 28(b)(6). The State's motion to dismiss is allowed.

DISMISSED.

Judges STROUD and DIETZ concur.

VICKI ANN UNDERWOOD, PLAINTIFF
v.
DON RANDEL HUDSON, JR., DEFENDANT

No. COA15-283

Filed 15 December 2015

Domestic Violence—return of weapons—misdemeanor crimes of domestic violence

The trial court erred by denying defendant's motion for the return of his weapons surrendered under a domestic violence protective order. Defendant was no longer subject to a protective order, he had no pending criminal charges for acts committed against plaintiff, and his convictions for communicating threats and misdemeanor stalking were not misdemeanor crimes of domestic violence pursuant to 18 U.S.C. § 922(g)(9).

Appeal by Defendant from order entered 25 August 2014 by Judge Charles P. Gaylord, III in Wayne County District Court. Heard in the Court of Appeals 9 September 2015.

No brief filed on behalf of Plaintiff.

Everson Law Firm, PLLC, by Cynthia Everson, for Defendant.

INMAN, Judge.

Defendant Don Randel Hudson, Jr. ("Defendant") appeals the order entered denying his motion for the return of his weapons surrendered under a domestic violence protective order. On appeal, Defendant argues that the trial court erred by: (1) finding that Defendant and Plaintiff Vicki Underwood ("Plaintiff") had been in a domestic relationship; (2) finding that Defendant committed an act "involving assault"; (3) considering evidence outside the record; and (4) permitting the District Attorney to argue against Defendant's motion.

After careful review, because the crimes Defendant pled guilty to do not constitute "misdemeanor crimes of domestic violence" under 18 U.S.C. § 922(g)(9), we reverse the trial court's order and remand.

Factual and Procedural Background

On 11 January 2012, Plaintiff filed for and obtained an *ex parte* domestic violence protection order ("*ex parte* order") against Defendant. In the *ex parte* order, the trial court found that Defendant placed Plaintiff in fear of imminent serious bodily injury and continued harassment by "charg[ing]" Plaintiff in her car, trying to run Plaintiff over, continuing to call and text Plaintiff after being released on bond for the criminal charges that resulted from the incidents, and threatening to kill her. The trial court also found that Defendant had tried to commit suicide in 1995, threatened suicide "two years ago," and that Defendant "states he doesn't want to live without her." In addition to concluding that Defendant had committed acts of domestic violence against Plaintiff, the trial court determined that his conduct required that he surrender his firearms as authorized by N.C. Gen. Stat. § 50B-3.1(a). Pursuant to the *ex parte* order, Defendant surrendered two firearms to the Wayne County Sheriff.

On 16 April 2012, based on the conduct that led to the issuance of the *ex parte* order, Defendant pled guilty to communicating threats and misdemeanor stalking. Defendant was sentenced to 12 months of supervised probation.

On 16 April 2012, the trial court dismissed Plaintiff's DVPO action, concluding that Plaintiff had failed to prove grounds for issuance of a regular DVPO.

After completing his probation, on 13 August 2014, Defendant filed a motion for return of his firearms pursuant to N.C. Gen. Stat. § 50B-3.1(f). The matter came on for hearing before Judge Charles P. Gaylord, III on 25 August 2014. The trial court made only three findings of fact in the order, which was a form order on AOC-CV-320, Rev. 2/14, as follows:

> 2. The defendant filed a motion to return weapons surrendered pursuant to a domestic violence protective order entered on (date) 01/11/2012.
>
> . . .
>
> 4. A motion to renew is not pending.
>
> . . .
>
> 12. Other: Finding of a personal relationship involving assault or communicating threats at sentencing on criminal matter on April 16, 2012.[1]

Based entirely upon these findings, the trial court concluded that "the defendant is not entitled to the return of all firearms, ammunition, and gun permits surrendered to the sheriff pursuant to the domestic violence protective order entered in this case." Defendant timely appealed.[2]

Standard of Review

Our standard of review of an order for the return of firearms pursuant to N.C. Gen. Stat. § 50B-3.1(f) is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Gainey v. Gainey*, 194 N.C. App. 186, 188, 669 S.E.2d 22, 24 (2008). The trial court "must (1) find the facts

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1. The trial court did NOT check any of the other potential findings listed on this form, including No. 6 (a) which states that: "The defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any state law in that (state facts indicating why disqualified under federal or state law, e.g., convicted of a misdemeanor domestic violence crime or possession of a weapon of mass destruction, etc.)."

2. On appeal, neither Plaintiff nor any attorney on behalf of the Wayne County Sheriff's Department filed an appellee brief. However, in every appellate pleading, Defendant served both the office of the District Attorney who appeared in court to argue against Defendant's motion and the Wayne County Clerk of Court. Therefore, based on the record before us, we cannot conclude that any failure of the State to respond to Defendant's brief was based on lack of notice.

on all issues joined in the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly." *Id.*

Analysis

Defendant challenges the trial court's order on several bases, including the lack of findings showing that Defendant and Plaintiff were in a "domestic relationship," the lack of evidence that Defendant had committed an act "involving assault," and the manner in which the trial court conducted the hearing.

N.C. Gen. Stat. § 50-3.1(f) sets forth the inquiry which the trial court must make on a motion for return of firearms:

> Upon receipt of the motion, the court shall schedule a hearing and provide written notice to the plaintiff who shall have the right to appear and be heard and to the sheriff who has control of the firearms, ammunition, or permits. The court shall determine whether the defendant is subject to any State or federal law or court order that precludes the defendant from owning or possessing a firearm. The inquiry shall include:
>
> (1) Whether the protective order has been renewed.
>
> (2) Whether the defendant is subject to any other protective orders.
>
> (3) Whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law.
>
> (4) Whether the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order. The court shall deny the return of firearms, ammunition, or permits if the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or if the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order until the final disposition of those charges. N.C.G.S. § 50B-3.1

It is undisputed that Defendant was no longer subject to a protective order and that he had no pending criminal charges for acts committed against Plaintiff. The only question presented at the hearing was

"whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law." No argument was made before the trial court or this court that any state law would prevent Defendant from owning or possessing a firearm. Thus, the only question was whether Defendant was disqualified by federal law.

At the hearing, the parties presented only legal arguments regarding whether Defendant was disqualified by federal law based upon Defendant's two convictions for communicating threats and misdemeanor stalking from 16 April 2012. No evidence was presented at the hearing other than the April 2012 judgments for misdemeanor stalking and communicating threats as reflected in the trial court's finding no. 5: "The Court finds this is an offense involving assault or communicating a threat, and the defendant had a personal relationship as defined by G.S. 5013-1(b) with the victim."

Although the trial court's order did not clearly identify any legal basis for denying Defendant's motion, the Judge's comments when he announced his order in open court,[3] along with the fact that the only arguments presented focused on 18 U.S.C. § 922, imply that the court denied the motion based upon that federal statute, which prohibits anyone who has been "convicted in any court of a 'misdemeanor crime of domestic violence' " from possessing a firearm. *See also United States v. Castleman*, 134 S. Ct. 1405, 1409, 188 L. Ed. 2d 426, 432 (2014). A "misdemeanor crime of domestic violence" is defined as:

> (i) [] a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. 921(a)(33)(A).

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3. The rendition was as follows: "The finding of number five (on the criminal judgment) on this matter does give the court concern and at this time I am not going to be entering an order to return the weapons based upon the fact there was the finding in that, then I understand there may some Federal issues with that, you are certainly free to bring but at this time, I will not be ordering the return."

To determine whether a prior conviction qualifies as a "misdemeanor crime of domestic violence," as it is defined by federal law, the courts first apply the categorical approach which "look[s] to the statute of [Defendant's] conviction to determine whether that conviction necessarily ha[d], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." *Castleman*, 134 S. Ct. at 1413, 188 L. Ed. 2d at 437. As explained by the Fourth Circuit, "[u]nder the categorical approach, we look only to the fact of conviction and the statutory definition of the prior offense . . ., focus[ing] on the elements of the prior offense rather than the conduct underlying the conviction." *United States v. Vinson*, 794 F.3d 418, 421 (4th Cir. 2015) (alteration in original).

The crime of communicating threats is set forth in N.C. Gen. Stat. § 14-277.1 (2013):

> A person is guilty of a Class 1 misdemeanor if without lawful authority:
>
> (1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
>
> (2) The threat is communicated to the other person, orally, in writing, or by any other means;
>
> (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
>
> (4) The person threatened believes that the threat will be carried out.

Although the offense of communicating threats includes as an element that the defendant threatens the use of physical force, it does not by its elements require either the: (1) use of physical force; (2) attempted use of physical force; or (3) threatened use of a deadly weapon Thus, based on the categorical test utilized by *Castleman*, Defendant's conviction for communicating threats does not constitute a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9).

The Supreme Court has noted that for purposes of determining whether certain convictions constitute a "misdemeanor crime of domestic violence," courts may look at other documents, including the charging documents, jury instructions, and plea documents, under the modified categorical approach. *Castleman*, 134 S. Ct. at 1414, 188 L. Ed. 2d at 438. However, the modified categorical approach is only appropriate if the

statute is " 'divisible'—*i.e.*, comprises multiple, alternative versions of the crime[.]" *Descamps v. United States*, 133 S. Ct. 2276, 2284, 186 L. Ed. 2d 438, 452 (2013).

Here, even if we were to assume, without deciding, that the communicating threats statute includes alternative elements as opposed to "alternate means of committing the same crime," *Vinson*, 794 F.3d at 425 (distinguishing crimes that have alternate means of committing the same crime with crimes that have "alternate elements" which effectively create separate crimes, only the latter of which constitute "divisible" crimes), no version of the predicate offense would categorically constitute a "misdemeanor crime of domestic violence" by its elements—*i.e.*, no variant of the offense has as an element the use of physical force, the attempted use physical force, or the threatened use of a deadly weapon. *See id.* ("Taking the last part of the divisibility definition first, we must determine whether at least one of the categories into which the crime may be divided constitutes, by its elements, a qualifying predicate offense."); *cf. Castleman*, 134 S. Ct. at 1413, 188 L. Ed. 2d at 437 (applying the modified categorical approach to a statute where one of the versions of the crime involved the use of physical force). Therefore, the trial court could not consider any outside documents to determine whether Defendant's conviction for communicating threats constitutes a "misdemeanor crime of domestic violence." And in fact, the record does not indicate that the trial court considered any additional documents or other evidence other than the judgment itself. Accordingly, Defendant's conviction for communicating threats does not constitute a "misdemeanor crime of domestic violence" and does not preclude Defendant from owning or possessing firearms under federal law.

Similarly, Defendant's conviction for misdemeanor stalking also fails to qualify as a "misdemeanor crime of domestic violence." Section 14-277.3A(c) (2013) states that:

> A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:
>
> (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.

> (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

Under the categorical approach and looking solely at the elements of the crime, misdemeanor stalking does not necessarily involve the: (1) use of physical force; (2) attempted use of physical force; or (3) threatened use of a deadly weapon. Furthermore, even if we were to assume, without deciding, that the crime of misdemeanor stalking is divisible, no possible iteration of the crime includes these elements. Therefore, the modified categorical approach is inapplicable, and this Court may not look to other documents to see whether the underlying conduct that gave rise to Defendant's conviction could implicate the "the use or attempted use of physical force, or the threatened use of a deadly weapon," a necessary showing for a crime to constitute a "misdemeanor crime[] of domestic violence" under *Castleman*.

In sum, neither of Defendant's convictions constitutes a "misdemeanor crime of domestic violence," and federal law, specifically 18 U.S.C. § 922(g)(9), does not preclude Defendant from having or possessing a firearm, even if Defendant and Plaintiff were in a "personal relationship" as defined by N.C. Gen. Stat. § 50B-1(b). Therefore, the trial court erred in ordering that Defendant was not entitled to have his firearms returned on this basis, and we reverse the trial court's order and remand for further proceedings. On remand, the trial court should hold a hearing to determine if the parties' circumstances have changed since the prior hearing in such a way that Defendant would now be disqualified from return of weapons for any of the reasons specifically listed in N.C. Gen. Stat. § 50B-3.1, and if not, the trial court should enter an order for return of the weapons. As noted earlier, because of this holding, it is not necessary to address Defendant's remaining arguments on appeal.

Conclusion

Based on our review of relevant statutes, case law, and the record on appeal, we reverse the trial court's order denying Defendant's motion to return his weapons surrendered under a DVPO and remand for further proceedings as described above.

REVERSED AND REMANDED.

Judges CALABRIA and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 15 December 2015)

FED. POINT YACHT CLUB v. MOORE No. 15-92	New Hanover (12CVS190)	Affirmed
FRANCE v. N.C. DEP'T OF PUB. SAFETY No. 15-190	N.C. Industrial Commission (TA-23744)	Affirmed
IN RE J.I.M. No. 15-748	Macon (12JT2)	Affirmed
IN RE J.R. No. 15-599	Lincoln (12JT56-57)	Affirmed
IN RE M.A.M. No. 15-713	Wake (14JT306)	Affirmed
IN RE O.M. No. 15-692	Forsyth (11JT73)	Affirmed
IN RE S.C. No. 15-612	Mecklenburg (13JB417)	Affirmed
IN RE J.C.B. No. 15-373	Henderson (06JT37)	Affirmed
IN RE J.P. No. 15-677	Alleghany (14JA26)	Affirmed
IN RE L.M. No. 15-401	Mecklenburg (14JA17-19)	Affirmed in part, reversed in part, and vacated and remanded in part.
PHILLIPS v. HAYNES No. 15-245	Davidson (13CVD1025)	Affirmed
STATE v. BIZZELL No. 15-163	Duplin (13CRS51326)	No Error
STATE v. BURRISS No. 15-346	New Hanover (14CRS50566)	No Plain Error In Part; Dismissed In Part.
STATE v. DESPAIN No. 15-685	Haywood (14CRS52633) (14CRS881)	Affirmed In Part; Dismissed In Part.

STATE v. FLETCHER No. 15-661	New Hanover (12CRS61266)	Vacated
STATE v. GRAVES No. 15-316	Guilford (12CRS78766-67)	Affirmed
STATE v. HAMILTON No. 15-256	Craven (11CRS55226) (12CRS53355) (12CRS54749-50) (12CRS54753-54) (13CRS50824-52) (13CRS50884-90) (13CRS50905-12) (13CRS50915-16)	Affirmed in part; and remanded
STATE v. HERRERA No. 15-674	Mecklenburg (13CRS38173-76) (13CRS38179)	No Error
STATE v. HURTADO No. 15-211	Wake (13CRS223181)	No Error in Part; Vacated and Remanded in Part
STATE v. HUTCHENS No. 15-275	Burke (13CRS1745) (14CRS346)	No Error
STATE v. JACOBS No. 15-493	New Hanover (12CRS54320)	No Error
STATE v. LYONS No. 15-418	Pitt (13CRS60236-37) (13CRS60239-40)	No Plain Error
STATE v. MARKUNAS No. 15-548	Granville (12CRS51949)	Vacated and Remanded
STATE v. McCURRY No. 15-271	Rutherford (12CRS53457-59)	Affirmed
STATE v. MENDEZ-LEMUS No. 15-183	Mecklenburg (13CRS230909) (13CRS230911)	No Error
STATE v. MERRICKS No. 15-198	Orange (14CRS51220-21)	Reversed and Remanded
STATE v. MUSTARD No. 15-147	Cleveland (12CRS50269)	No Error

STATE v. RAINEY No. 15-307	Mecklenburg (14CRS18649) (14CRS200593) (14CRS207764)	No Error
STATE v. SCOTT No. 15-559	Wake (13CRS224312)	Dismissed
STATE v. THACH No. 15-511	Perquimans (12CRS50361) (13CRS29-32)	No prejudicial error in part; no error in part
STATE v. VALENCIA No. 15-477	Wake (13CRS205847-48)	No Error
STATE v. WALLS No. 15-289	Guilford (13CRS24631) (13CRS87731)	No Error
STATE v. WHISNANT No. 15-607	Catawba (09CRS56222)	Vacated in Part and Remanded
STATE v. WILDER No. 15-145	Franklin (06CRS4148-4152)	Reversed
SWAN BEACH COROLLA, L.L.C. v. CNTY. OF CURRITUCK No. 15-293	Currituck (12CVS334)	Affirmed in part; Dismissed in part.

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